No. 10,189

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMPIRE OIL AND GAS CORPORATION (a corporation), and CHESTER WALKER COLGROVE, trading as Colusa Products Company,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

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JURISDICTION OF THE COURT.

This is an appeal from a judgment of the District Court of the United States, Northern District of California, Southern Division, convicting appellants under an information charging them with three counts of misbranding certain products distributed by them for use in the treatment of skin diseases. This information charges violations of the Act of Congress of June 25, 1938, known as the Federal Food, Drug and Cosmetic Act. (52 Statutes at Large, 1040; 21 U. S. C. 331.) After pleas of not guilty, a jury trial was had, and both appellants were convicted on all three counts of said information.

STATEMENT OF CASE.

Foreword.

The startling thing about this case is that although the only true issue was whether or not appellants' drugs were efficacious in the treatment of psoriasis and certain other skin diseases named in the information, the *entire* case in chief of the Government consisted of testimony by certain so-called expert witnesses, *not one of whom had ever so much as used or tested these products in the treatment of any of said skin diseases.* In fact, of the *ten* "experts" whose testimony comprised the *entire* Government case in chief, only *two* were skin disease specialists. Furthermore, neither of these two gentlemen *had ever seen appellants' products* let alone tested them! Incidentally, one of these specialists had just made a complete failure of his efforts to treat a severe case of psoriasis of a patient named Mrs. Mead. This lady, as a witness for the defense, testified as to the remarkable results accomplished by appellants' products in quickly clearing up her horrible skin disease, after her years of unsuccessful attempts to secure relief by treating with various skin specialists.

In short, appellants are in effect branded as criminals as a result of the testimony of these men *who had never even used or tested these products* in the treatment of such skin diseases, notwithstanding that the record in this case plainly shows, *without contradiction,* that not only are these products of appellants absolutely harmless and non-toxic, but also that they have accomplished great good in the treatment of psoriasis and these other skin diseases, for most of which afflictions the medical profession admits that it has no effective remedy.

Equally startling were the rulings and the attitude of the trial court with respect to Dr. Von Hoover, a vital defense witness. This highly trained scientist, a nationally known pharmacologist, whose very profession and business is that of testing the efficacy of drugs, and whose clientele includes many nationally known pharmaceutical

houses, conducted a long series of clinical and laboratory tests to determine the efficacy of appellants' products *in the treatment of the very skin diseases involved in this case.* These tests included *the actual clinical use of these products in many cases of these very skin diseases.* The defense brought this witness from his laboratory at San Antonio, Texas, to testify as to these careful and scientific tests, and the results thereof. Surprisingly enough, however, the trial court prevented the defense from using such evidence. While, on the one hand, it permitted the Government's experts free rein in voicing their opinions (which, under the circumstances, were nothing more than "guesses") as to the lack of efficacy of appellants' products, *on the other hand, it prevented Dr. Von Hoover from giving to the jury the benefit of this lengthy and scientific testing and investigation of these products on the very skin diseases involved in this case.* The court based its various and erroneous rulings, with respect to Dr. Von Hoover, on the utterly unsound premise that he was not competent to testify *because he was not a physician and surgeon.*

The defense also produced many "user" witnesses, laymen from various walks of life, who testified as to the great good accomplished by appellants' products in the treatment of their own horrible cases of psoriasis and the other miserable skin diseases involved in this case. The testimony of these disinterested witnesses clearly and indisputably shows that severe and long standing cases of such skin afflictions (cases which had baffled many eminent skin specialists and such noted institutions as Mayo Brothers, Battle Creek Sanatorium, Queens General Hospital, University of California Clinic, and others) were cleared up in the space of a few months by the use of appellants' products. *Not one line of this testimony was refuted or contradicted. It stands wholly unimpeached.*

The defense also produced practicing physicians who had successfully used appellants' products in the treat-

ment of these skin afflictions. These trained medical men were emphatic in their praise of these products, and they related in detail the many skin cases in which they had successfully used these products, and described in much detail the actual beneficial results and effects which they observed in treating these difficult cases with appellants' products.

Notwithstanding this state of the evidence, and in spite of the fact that the only true issue involved in this case was as to the efficacy of appellants' products in the treatment of these skin diseases, the jury returned a verdict which, in effect, branded said products as worthless.

We believe that the reasons for this surprising, unjust, and anomalous result will become apparent to this Honorable Court from the subsequent sections of this brief dealing with the errors and attitude of the trial court in the trial of this case.

We, counsel for appellants, sincerely believe that a serious miscarriage of justice has occurred in this case, and we shall herein do everything we can to demonstrate this to this Honorable Court. Particularly so, because this case is of importance to many persons besides appellants. It obviously is of importance to the thousands of persons now suffering from these horrible skin diseases and for which the medical profession admits that it knows no cure, and to whom these Colusa products may one day give that surcease for which they have vainly been searching in their pitiful efforts to rid themselves of the itching, discomfort and pain of these unsightly and miserable skin afflictions.

The Facts as to Appellants' Business.

For several years past, appellant Empire Oil and Gas Corporation has been engaged in the business (under the trade name of Colusa Products Company) of distributing certain products (Colusa Natural Oil, Colusa Natural Oil

Capsules, Colusa Hemorrhoid Ointment) to persons throughout the United States suffering from psoriasis and other skin diseases. Appellant Colgrove is the president and manager of said corporation. (Tr. 161, 254.)

This Colusa Natural Oil is a natural petroleum product, produced from certain wells and seepages in Colusa County, California. The production of this oil is a very expensive process, principally because thousands of gallons of water must be pumped to produce a single gallon of this medicinal oil. (Tr. 25.)

During the past few years, thousands of skin sufferers, scattered throughout the United States, have become users of these Colusa Products. The distribution of these products has been carried on largely by mail order, all sales being made under a rigid guarantee, pursuant to which the customer is entitled to a refund of his money in the event that he is not fully satisfied with the results. (Tr. 177-178.)

Facts as to This Criminal Proceeding.

On March 24, 1942, the United States Attorney for the Northern District of California filed an unverified information against Empire Oil and Gas Corporation and Chester Walker Colgrove, appellants herein, charging them with the violation of the aforementioned Federal Food, Drug and Cosmetic Act. This information consists of three counts, each purporting to charge misbranding under said statute. (Tr. 2-12.)

The defendants entered their pleas of not guilty to all three counts, a jury trial was had in June, 1942, and the jury returned a verdict of guilty as to both defendants on all three counts. (Tr. 302.)

The court imposed fines against the defendant Chester Walker Colgrove of $500.00 on each count, with an alternative jail sentence (Tr. 311), and a fine of $1.00 on each

count as to the defendant Empire Oil and Gas Corporation. (Tr. 309.) Appeals have been duly perfected by each defendant, and the record on appeal consists of a printed transcript of record containing the testimony, the Assignment of Errors, and the other requisite papers and data.

SUMMARY STATEMENT OF POINTS ON APPEAL.

In support of their contention that the judgment of the lower court should be reversed, appellants will argue in this brief six major propositions, viz.:

I. The Evidence Is Insufficient to Warrant a Conviction.

II. The Trial Court Committed Highly Prejudicial Errors in Connection With the Testimony of Dr. C. E. Von Hoover, a Vital Defense Witness.

III. The Trial Court Committed Prejudicial Error in Refusing to Admit in Evidence the Voluntary Testimonials Offered by the Defense.

IV. The Third Count Is Duplicitous.

V. The Trial Court Committed Various Other Prejudicial Errors at the Trial.

VI. The Trial Court Erred in Its Instructions to the Jury.

ARGUMENT.

I. THE EVIDENCE IS INSUFFICIENT TO WARRANT A CONVICTION.

(A) Pertinent Assignments of Error.

"Assignment No. I. The Court erred in denying the motions of appellants for a directed verdict of Not Guilty on Count One made by the defendants at the conclusion of the taking of evidence in this cause, which said ruling was duly excepted to by appellants.

Said court erred in this because the evidence was and is insufficient to sustain a verdict of guilty against said defendants, or either thereof, as to said count, and said verdict was and is against the law." (Tr. 333.)

"Assignment No. II. The Court erred in denying the motions of appellants for a directed verdict of Not Guilty on Count Two made by the defendants at the conclusion of the taking of evidence in this case, which said ruling was duly excepted to by appellants. Said Court erred in this because the evidence was and is insufficient to sustain a verdict of guilty against said defendants, or either thereof, as to said count, and said verdict was and is against the law." (Tr. 333-334.)

"Assignment No. III. The Court erred in denying the motions of appellants for a directed verdict of Not Guilty on Count Three made by the defendants at the conclusion of the taking of evidence in this case, which said ruling was duly excepted to by appellants. Said Court erred in this because the evidence was and is insufficient to sustain a verdict of guilty against said defendants, or either thereof, as to said count, and said verdict was and is against the law." (Tr. 334.)

(B) The Settled Law as to Duty and Right of Appellate Court to Upset Verdict Where Evidence Insufficient.

At the outset of our argument under this point, we desire to state that we are fully mindful of the rule of law, often enunciated by this Honorable Court, that such a tribunal will not disturb a verdict where there is a substantial conflict in the evidence adduced by the respective parties in the lower court.

Equally well settled, however, is a rule which we invoke herein. We rely upon the rule of law that in order to sustain a criminal conviction, the evidence adduced in the lower court must be sufficient to prove the guilt of the defendants beyond a reasonable doubt, and must exclude every other hypothesis than that of guilt. The fol-

lowing are a few enunciations of this settled legal principle.

> "It has been held in a long line of decisions in substance that, unless there is substantial evidence of facts which exclude every other hypothesis than that of guilt, it is the duty of the trial judge to direct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment against the accused." (Citing cases.) *Graceffo v. United States* (C. C. A. 3, 1931), 46 Fed. (2d) 852, at 853.

This rule is also stated in *Von Gorder v. United States* (C. C. A. 8, 1927), 21 Fed. (2d) 939, at 942, as follows:

> "This is a criminal case. * * * If he is innocent of the crime charged against him, an irreparable injury will be inflicted upon him by the affirmance of the judgment before us. After a careful scrutiny of all the evidence and the proceedings in the trial of this case, we cannot divest our minds of the conclusion that there was not sufficient evidence of the guilt of the accused at his trial to sustain the verdict of his conviction under the established rules of law to which reference has been made."

Another statement of this rule is to be found in the early case of *Union Pacific Coal Company v. United States* (C. C. A. 8, 1909), 173 Fed. 737, 740, viz.:

> "There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction. (Citing many cases.)"

In each of said three cases aforementioned, a Circuit Court of Appeals reversed a conviction on the same ground we rely upon herein, the insufficiency of the evidence in the lower court.

(C) Application of Said Rule of Law to the Instant Case.

We contend that not only is the evidence in our case insufficient to exclude every other hypothesis but that of guilt, but, to the contrary, *the undisputed evidence clearly demonstrates the innocence of these defendants.*

In an effort to prove this contention, we will first analyze the three counts in the information in order to define the true and controlling issues; secondly, we will present a summary review of all of the evidence; and thirdly, we will then undertake to show the insufficiency of this evidence in the light of said true issues in the case.

(1) THE TRUE ISSUES IN THIS CAUSE.

The Information.

The information (Tr. 2-12) is in three counts. The first (Tr. 2-7) alleges that appellants shipped in interstate commerce, from Berkeley, California, to Mountainair, New Mexico, a package containing a number of bottles of Colusa Natural Oil; that each bottle bore a certain label (which is set forth on page 3 of the Transcript); that enclosed in this package of bottles was a certain circular and newspaper mat, containing various statements which are quoted *verbatim* in the information. (Tr. 4-6.) The information then proceeds to allege that said drug was misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, because *these various statements* appearing in this circular and quoted in the information were *FALSE AND MISLEADING*

IN THAT

"Said statements represented and suggested that said drug, when used alone or in conjunction with

Colusa Natural Oil Capsules, would be **EFFICACIOUS IN THE TREATMENT OF** eczema, psoriasis, acne, ringworm, athlete's foot, burns, cuts, poison ivy and varicose ulcers; would act on surface skin irritations as a stimulant and would increase circulation and aid in healing; would be efficacious to relieve discomfort and pain; would be efficacious to inhibit the spreading of skin irritations and to restore the normal skin surface, and would be efficacious to kill or check disease germs." (Tr. 6.)

The information then proceeds to allege that said drug would not be efficacious for any of said purposes, and was therefore misbranded.

The Second Count.

The second count (Tr. 7-10) is substantially the same as the first. It involves the same shipment to New Mexico but refers to a package containing bottles of Colusa Natural Oil Capsules. These are simply Colusa Natural Oil in capsule form. The charges with respect to misbranding are identical with those set forth in the first count.

The Third Count.

The third count (Tr. 10-12) involves the same shipment to New Mexico but refers to a package containing a number of jars of Colusa Hemorrhoid Ointment. This count really consists of *two distinct charges* or alleged offenses. The first is an alleged misbranding. With respect to this first phase, the information charges that enclosed in the package was a circular containing the following statement:

"Colusa Natural Oil Hemorrhoid or Piles Ointment. For external use in relieving the discomforting irritations of Hemorrhoids or Piles * * *" (Tr. 11.)

The third count then proceeds to charge that said hemorrhoid ointment was misbranded in that the said statements in said circular regarding the efficacy of the

drug were *false and misleading,* **IN THAT** these statements represented and suggested that the drug would be efficacious in the treatment of hemorrhoids and piles, whereas in truth and in fact, said drug would not be efficacious in the treatment of hemorrhoids and piles.

The second (and wholly distinct) phase of the third count consists of the charge, at the end thereof (Tr. 12), that said hemorrhoid ointment was misbranded in that it was in package form and its label did not bear an accurate statement of the quantity of the contents in terms of weight or measure.

Under this information (putting aside for the moment said second phase of the third count) *the only true and controlling issue was and is as to the efficacy of these Colusa products in the treatment of the respective ailments referred to in said three counts in the information.* We stress this because many irrelevant and false issues were created by the Government in connection with the trial of this cause, which no doubt confused the jury and obscured the utter weakness and insufficiency of the government's evidence with respect to said controlling issue.

(2) SUMMARY REVIEW OF EVIDENCE.

The Government's Case in Chief.

At the outset, and to save time and government expense, defendants stipulated to the making of the shipments referred to in the three counts in the information, the labelling of these shipments, and to the identity of certain samples taken therefrom by the Government's agents. (Tr. 15-18.)

Thereupon, the Government called *ten* witnesses who comprised its entire case in chief, all testifying as "experts", viz.:

The first two (*Buell,* Tr. 18-33; *Yakowitz,* Tr. 33-39), chemists of the Federal Food and Drug Administration, testified as to what they considered to be the constituents of this Colusa Natural Oil. (Tr. 19.) This testimony was

based upon a chemical analysis made by them in less than two days' time. (Tr. 30.) Neither of these witnesses had ever analyzed petroleum oils for the petroleum industry (Tr. 29, 37), and both admitted on cross-examination that the petroleum family (hydro-carbons) is a very complex chemical family or series of families, and that the process of determining all the constituents of a crude oil by fractional distillation requires months of chemical research. (Tr. 29, 38.) Even counsel for the Government admitted the complexity of said matter:

> "Mr. Gleason. Counsel, if you want to know about it, the relevancy is simply this: that out of a given crude oil there are hundreds of different compounds that are produced by this fractional process and they can't be produced in two hours' time or two days' time.
>
> "Mr. Zirpoli. I recognize that and we all know it." (Tr. 39.)

The next witness, *Dr. Anna Mix,* also a chemist in the Federal Food and Drug Administration, testified that she examined a bottle of Colusa Natural Oil to determine the presence of radium emanations or radioactivity, but found none. (Tr. 39-42.)

The Government then called two bacteriologists (*Mary Smith,* Tr. 42-45 and *Nicholas Leone,* Tr. 45-50) who testified as to certain laboratory tests which they, in collaboration, made of Colusa Natural Oil. These tests were made to see if this oil would destroy or inhibit *two* germ organisms, the first being *staphylococcus aureus* (the ordinary pus forming organism), and the second, the typhoid fever organism. (Tr. 43.) They admitted that there are literally millions of germ cultures which could have been used. (Tr. 43.) They also stated that they used these two because they are generally used in testing for germicidal qualities. They made no tests of the oil on any organism, germicidal or otherwise, involved in psoriasis or these other skin diseases. In fact, Government counsel expressly disclaimed that the evidence up to this point related at all to skin diseases.

"Mr. Zirpoli. We haven't had any evidence in this trial yet as to what skin diseases. The Government has the witnesses, and will submit them, on that particular subject. The issue in so far as this witness is concerned is not with relation to those diseases. There is a claim that it is germicidal, and he is testifying solely as to whether or not it will kill germs.

"Mr. Doyle. Typhoid germs.

"Mr. Zirpoli. Typhoid and the common pus germ that he has testified about.

"Mr. Doyle. That is all.

"Mr. Zirpoli. Yes, I agree that that is all he testified about." (Tr. 49-50.)

The remaining *five* witnesses of the Government were doctors. The first, *Dr. Tainter* (Tr. 50-65), a professor of pharmacology, testified as to certain things he found by a simple examination of a sample of Colusa Natural Oil (i.e., that it was not astringent, not irritating, did not contain iodine, camphor or radium emanations, etc.) (Tr. 51-53.) Over objection of the defense he then voiced various opinions, including the opinion that this oil would not be effective in the treatment of the various skin diseases involved in this case. (Tr. 53-59.) On cross-examination, he admitted that he was not a dermatologist; that he had never treated any of the skin diseases mentioned in the information, nor had he made any clinical or other tests of this oil on any of said skin diseases. In fact, he disclaimed any real knowledge of psoriasis, viz.:

"Mr. Gleason. Q. That (psoriasis) is one of the most difficult skin diseases known to the medical profession, is it not?

"A. I am not qualified as a dermatologist, so I couldn't answer." (Tr. 61.)

He likewise admitted:

"There are many diseases for which we do not have the real remedy because we do not know the real causative agent. Yes, the medical profession has a great many diseases as to which it does not know the true cause." (Tr. 62.)

He likewise admitted that the Colusa Hemorrhoid Ointment might be palliative in relieving the itching incident to hemorrhoids, that "it might help the itching temporarily, but would not cure the condition." (Tr. 55.)

Dr. James W. Morgan (Tr. 65-68), a specialist in rectal cases, testifying *purely hypothetically* (on the basis of the ingredients of the Colusa Hemorrhoid Ointment as related to him in court by Government counsel) voiced the opinion that such an ointment would not be beneficial in the treatment of hemorrhoids. He admitted, on cross-examination, that he had never seen the Colusa Hemorrhoid Ointment, or ever used any of it, and that his opinion as to its efficacy was purely hypothetical (Tr. 66) and that the specialists in his field have varying views as to the efficacy of ointments. (Tr. 67.)

Dr. Harry Templeton (Tr. 68-70), specializing in syphilology and dermatology, *also testifying purely hypothetically* on the basis of the recited ingredients of Colusa Natural Oil, and without ever having seen or used this product, voiced the opinion that it would not be efficacious in the treatment of psoriasis and the other skin diseases mentioned in the information. His cross-examination concluded:

> "Psoriasis is a very difficult disease and I know no cure for it." (Tr. 70.)

Dr. George Kulchar (Tr. 70-75), a specialist in syphilology and dermatology, also testified *purely hypothetically* and without ever having seen or made any use or clinical tests of Colusa Natural Oil. He voiced substantially the same opinions as Dr. Templeton (i.e., that these Colusa products would not be efficacious in the treatment of psoriasis and these other skin diseases). On cross-examination, he was asked if he recalled a former patient of his, Mrs. Gilbert Mead, and he stated it was possible that he had treated her for psoriasis, but that he did not recall her. Mrs. Mead was then asked to stand up in the courtroom so as to be identified as his former

patient. Counsel for the Government objected, and thereupon counsel for the defense stated the following, viz.:

> "Mr. Gleason. Yes, your Honor. I am trying to cross examine this expert, or so-called expert, on psoriasis, and I am going to use as the basis of my cross-examination a patient of his by the name of Mead." (Tr. 75.)

Strangely enough, and in spite of the fact that the witness had theretofore qualified himself as a specialist in dermatology and had voiced a very definite opinion as to the lack of efficacy of these Colusa products in the treatment of psoriasis and other skin diseases, he thereupon (no doubt well remembering his complete failure in the treatment of Mrs. Mead) immediately volunteered:

> "The Witness. I do not wish to qualify as an expert on psoriasis." (Tr. 75.)

The last witness for the Government was *Dr. Frederick Fender* (Tr. 75-77), a surgeon and clinical instructor at Stanford University in surgery. He also *testified purely hypothetically,* and voiced the opinion that Colusa Natural Oil would not be efficacious in the treatment of varicose ulcers, and that the taking of the oil in capsule form would not prove efficacious in the treatment of varicose ulcers. (Tr. 76.) The following then occurred, viz.:

> "Q. Would the two taken in conjunction prove efficacious?
>
> "A. I wish we could find any combination that would, of anything." (Tr. 76.)

On cross-examination, he admitted that he had never used this oil in the treatment of any patients. (Tr. 77.)

The Defense Evidence.

The defendants, constantly urged by the court to proceed and get through with their case (p. 68, infra), called nineteen witnesses to the stand, most of them being laymen who had successfully used these Colusa products to treat the very diseases involved in this case. Had time

permitted, we could have called literally dozens and dozens more grateful users to describe their success in treating their horrible and severe cases of skin diseases with these products. (See Testimonials, Exhibit Q-1 for Identification.) (Tr. 181-250.)

In view of the fact that the true and only controlling issue in this case was as to the efficacy of this Colusa Natural Oil in the treatment and relief of the skin diseases mentioned in the information, the defense, because of these time limitations, decided to devote their case to *direct, actual and concrete proof of the use and effectiveness of these products in the treatment of these very skin diseases,* rather than to refuting the unimportant and collateral technical and theoretical matters injected by the Government's case (which matters, in our humble opinion, really had no material bearing on the aforementioned true and controlling issues). We have in mind such technical matters, for example, as the rather nebulous subject of the penetrating effect and power of radium emanations (which subject played a prominent part in the Government's case), or the equally irrelevant technical Government evidence as to the inability of this Colusa Natural Oil to kill *typhoid* germs. In short, to demonstrate that this Colusa Natural Oil and its related products were efficacious and meritorious, the defense called to the witness stand many witnesses from various walks of life, who testified, in a simple and straightforward manner, as to their experience in the use of this oil and as to its effectiveness. Some of these witnesses proudly exhibited their clean skins as living testimonials to the efficacy of these Colusa products. *Not one line of this testimony was refuted, nor was any one of these witnesses impeached in any manner whatsoever.* Various photographic exhibits, showing the skin conditions of these persons "before" and "after" their use of Colusa Natural Oil were also introduced.

The first defense witness, *Frank Fazio* (Tr. 77-79), a barber, aged fifty-four, testified to the splendid results

achieved by him *in three weeks' time,* in clearing up a very severe case of psoriasis, *of twenty-seven years' standing,* and which had baffled many noted institutions (Battle Creek Sanitarium, etc.) and various skin specialists.

Dr. William G. Woodman (Tr. 79-82), an osteopathic physician and surgeon from Los Angeles, with unlimited license to practice, and a member of the staff at the Los Angeles County Hospital, testified as to his very successful use of these Colusa products in various severe psoriasis cases. He also testified as to how the Federal agents had attempted to dissuade him from appearing as a witness in this case (Tr. 82) (which testimony was later disputed by a government agent. (Tr. 271).)

Donald R. Crawford (Tr. 83-85), a ticket seller for the Union Pacific Railroad at Los Angeles, testified as to the excellent results achieved by him in treating his annually recurring and very severe attacks of poison oak. He told of his first using this oil one night when the affliction was so severe he could not lie in bed and had just saturated a turkish towel with the weeping secretion of the blisters. (Tr. 83.)

> "I applied the oil at one o'clock in the morning, and at one-thirty that weeping stopped and you could practically see that thing heal. Inside of one week I was back on the job with no more time lost." (Tr. 83.)

He testified that he had a recurrence in 1941, and immediately used this oil and had it quite well cleared up in three days' time.

> "In previous years I had tried countless remedies; none ever gave me the relief that Colusa Natural Oil gave me." (Tr. 84.)

He also was visited by the Federal Food and Drug agents who told him he "might just as well use a crankcase oil." (Tr. 84.)

Henry N. Stabeck (Tr. 85-87) of Los Angeles, aged sixty-seven, a retired investment banker, testified as to the quick cure of an attack of athlete's foot by the use of this Colusa Oil, and also of his successful use of Colusa Oil Capsules to clear up a long standing ulcerated stomach condition for which he had previously treated with various doctors.

Josie Mead (Tr. 87-89), a hairdresser from Oakland, then told of clearing up a very severe case of psoriasis with this Colusa Natural Oil. This woman suffered from this disease for about three years, and had unsuccessfully treated with various skin specialists, including Dr. Kulchar, the Government's "expert". She testified as to Dr. Kulchar's wholly unsuccessful efforts to treat her case.

> "He tried x-ray, gave me quartz and various shots, gave me medicines and then he finally put methylene blue on my feet and painted those twice in two weeks, told me to use aromatic spirits of ammonia to remove that. My feet broke down and he said I didn't respond." (Tr. 87-88.)

She further testified that Dr. Kulchar gave her a preparation which took the skin off her feet. This is the same Dr. Kulchar who testified so freely, as an expert for the Government, as to the inefficacy of Colusa Natural Oil, without ever having even attempted to test it. She also testified that Dr. Kulchar finally told her that she was ruining his reputation. (Tr. 87.) She also described the horrors of this disease as follows:

> "This disease affected me all over; I suffered day and night; the itching was terrible; it affected my feet, knees, elbows and the palms of my hands, accompanied by this scaly condition." (Tr. 88.)

She then testified that she had, in desperation, used Colusa Natural Oil, *only four weeks previously to her being called as a witness in this case,* and that in that short space of time, she was almost completely cured of this severe ailment.

> "I took the capsules and the oil for this psoriasis condition and it began to soothe me, and in five days I was so relieved that I couldn't express my gratefulness. I am almost completely cured." (Tr. 88.)

The witness also identified a bottle which she said was the methylene blue prescribed by Dr. Kulchar and which took her skin off, the last of the several treatments which this "expert" unsuccessfully used in connection with her case.

There was no cross-examination.

Mrs. Teresa Loughran (Tr. 89-90), aged sixty-two, told of being bedridden for a long period by a severe leg ulcer which she completely cleared up in the space of about *three weeks* with Colusa Natural Oil.

Mrs. Agatha Harless (Tr. 91), a housewife, testified that after treating in vain with various doctors and trying x-ray and various other treatments, she completely cleared up a very severe case of eczema which covered her hands and wrists. This woman had also been treated, without success, by Dr. Kulchar, the Government's expert, and other doctors.

Mrs. Rena Gerlach (Tr. 92), a housewife, told of the horrible skin disease which covered her hands and arms, and which so incapacitated her that her son had to feed her. She related how she had consulted various specialists and had used almost every patent medicine on the market, all without success. Finally, early in 1942, Colusa Natural Oil completely cured her *in about three weeks.* This witness removed her gloves and exhibited her clean hands and arms to the jury. She also described in detail the horrible suffering and anguish incident to this disease:

> "This disease was all over my hands and went up to my arms, just running all the time; I had to keep my hands raised up, and because they were so sore I couldn't touch anything. My son had to feed me most of the time; my skin was running and itching;

my hands would swell three times their normal size. * * * I couldn't sleep; I couldn't feed myself; I couldn't wash my face. With two hands tied up you can't do anything." (Tr. 92.)

Howard Everett (Tr. 93-95), aged seventy-five, a former banker now residing in Los Angeles, who has had hemorrhoids for thirty-five years and has treated with many doctors and has tried everything available at drug-stores, testified as to the excellent effect of Colusa Oil in relieving and treating this ailment.

"This ointment gives greater relief than any product or treatment I ever had." (Tr. 93.)

The next witness for the defense, *Dr. W. T. Vincent* (Tr. 96-109), seventy-eight years of age, a practicing physician from Houston, Texas, undoubtedly knows more about these Colusa products and their effectiveness in the treatment of these skin diseases than any other pathologist in the United States. The professional medical career of this man has extended over a period of fifty-two years, during all of which time one of his specialties has been dermatology. He testified that he had treated practically all skin diseases during this practice, including *all* of the diseases mentioned in the information in this case. He further testified that psoriasis is considered very difficult to cure, and that many doctors have said it is incurable; that he had begun to use Colusa Natural Oil in the treatment of his patients a little over three years ago, and has used it hundreds of times in many cases of psoriasis, eczema and the other skin diseases involved in this case. This kindly and able old gentleman then proceeded to describe, in detail, various of these cases of severe skin diseases which he had thus successfully treated with this Colusa Natural Oil. Included in these was the Carl Alsobrook case, one of the severest and most terrible cases of psoriasis he had ever seen. This patient was almost a solid scab of scales and lesions on his back and chest when the treatment began, and after treating him with

Colusa Natural Oil for a period of months, *this condition completely cleared up.* "I cured him absolutely with this oil." (Tr. 97.)

Photographs (Def. Ex. D and E) were produced and identified by the doctor depicting the progress of Mr. Alsobrook's case. After describing other difficult cases successfully treated with this oil, the doctor then went on to describe in detail the beneficial results which he observed from the use of this product, including among these the palliative or quieting result accomplished by the immediate stopping of the itching and pain. He was very positive in his statement that Colusa Natural Oil had quickly mitigated the itching and pain incident to these diseases, and did this in practically every case, almost one hundred per cent and immediately. (Tr. 100.) He also testified to the very excellent penetrating effect of this oil into the skin and the actual healing, and restoration of new skin which would ensue shortly after the stopping of the itching and the alleviation of the skin lesions. He testified, on the basis of his long and extensive use of this oil in these various and assorted cases of skin diseases, that his firm conviction was,

> "I know it is the best treatment I have ever used." (Tr. 100.)

He also testified that he had used the Colusa hemorrhoid ointment in treating cases of hemorrhoids, and had found it very satisfactory in relieving the itching and burning incident to this condition. He also stated that he himself had suffered from that condition and had used this ointment and had found that it stops the itching immediately. (Tr. 102.)

The witness was subjected to a lengthy cross-examination, but none of his testimony with respect to these various cases treated by him with Colusa Natural Oil was in any manner impeached or weakened. To the contrary, he demonstrated, on this examination, a wide knowledge of

these skin diseases and reemphasized the effectiveness of these Colusa products in the treatment of such diseases.

Miss Evelyn Costello (Tr. 109-110), a young typist from San Francisco, testified to the quick relief of a long standing (seven years) severe case of eczema, for which she had treated for three years at Mayo Brothers and with many other doctors. She likewise presented her clean hands and arms as living proof of the effectiveness of this Colusa Oil.

Marco Sablich (Tr. 110-111), a San Franciscan, told of suffering for over twenty-three years with a severe case of psoriasis; of having treated with over thirty doctors; of going to Europe in a vain search for a cure; and of the great clearing up and improvement of his condition which he had accomplished by *five weeks' use* of this Colusa Oil, immediately preceding his appearance in this case.

Miss Adele Davis (Tr. 111-112), a beauty operator from Oakland, testified as to the clearing up of a long standing and miserable case of eczema by use of Colusa Oil, which gave her such immediate relief that: "Really to me it was magic." (Tr. 112.)

Dr. Gilbert L. Mead (Tr. 112) testified as to his successful use of Colusa Natural Oil on a severe burn, suffered by him two weeks previously to his being called as a witness in this case.

The next witness for the defense was *Dr. C. E. Von Hoover.* (Tr. 112-157.) This witness was perhaps the most important witness for the defense, because he was a highly trained pharmacologist who, together with his laboratory associates, had made extensive clinical and laboratory tests of these Colusa products, tests which involved the application of Colusa Natural Oil to many severe cases of the very skin diseases involved in this case. Appellants contend that the trial court committed highly prejudicial errors in connection with the testimony

of this witness, and inasmuch as this testimony will be reviewed in detail and at length in another main section of this brief (see pp. 33-49, infra), we will not argue it herein, but will respectfully request this Honorable Court to consider the statements and review of his testimony which is to be found in said subsequent portion of this brief as having been set forth also at this juncture.

Mrs. Opal Cameron (Tr. 157-158) testified as to the effectiveness of this Colusa Natural Oil in treating her severe case of eczema from which she has suffered since childhood.

Mrs. Wilma Welch (Tr. 158) testified as to the instant relief given to her by the use of Colusa Natural Oil on her case of athlete's foot.

Arthur W. Scott (Tr. 158-160), a shipyard welder, told of his successful use of this oil on severe burns and also on cuts.

The last witness for the defense was *C. W. Colgrove* (Tr. 161-259), one of the defendants. Inasmuch as Mr. Colgrove's testimony will be dealt with in various other portions of this brief, we will not review it at this juncture.

Government's Rebuttal Evidence.

It is quite evident from the record in this case that the Government's investigators scoured the country hoping to find people who had used this oil and who would testify that it failed to help them. The record shows that these agents visited some of the defense witnesses; that inspectors went over Dr. Von Hoover's records in San Antonio; that they checked on various patients of Dr. Vincent in Texas; and they no doubt did all they could to find dissatisfied users. Perhaps the most striking tribute to the efficacy of this natural oil lies in the complete failure of the Government to achieve any material measure of success in its efforts to find disgruntled users among the

thousands of persons who have used said remedy during the past few years.

The Government produced only five "user" witnesses in rebuttal whose testimony in no manner rebutted, destroyed or impaired the aforementioned defense evidence, viz.:

Homer H. Baumgartner (Tr. 261-263) of Los Angeles was suffering in 1940 from eczema. A friend put him in touch with Mr. Colgrove who had photographs made of his hands, first to show their terrible condition and then "after" the use of this oil. (Def. Ex. O.) Baumgartner, who was given this oil without charge, said that he did not credit the oil alone, but had used it in conjunction with an electric lamp. However, he admitted on cross-examination:

> "I then had this disease for sixteen years; I previously had gone to doctors but they had not cured this disease; they did not give me as much relief as I got from Colusa Oil; with the oil and lamp together I got relief for a short period; I never tried the lamp alone before nor since." (Tr. 263.)

Incidentally, Baumgartner's own sworn testimonial (Def. Ex. O), given in 1940 when he was grateful for the excellent results accomplished by Colusa Natural Oil (which sworn testimonial and the facts shown by the photographs therein were confirmed by him), clearly show the efficacy of this product and likewise confirm the very conservative claims made by appellants with respect to its effectiveness.

The Government then called one *Amos Guidry* (Tr. 264-266), one of Dr. Vincent's patients in Houston, Texas. He testified he had received some injections in addition to using this oil, and did not see that the oil had helped him. He did admit, however, that when he first met Dr. Vincent the disease covered his face (Tr. 265); that he was ashamed to go on the streets, and that prior to treating with Dr. Vincent, he had never found anything which

gave him relief. He further admitted that this oil did not make the itching worse, and today he is a grocery clerk.

The next witness was *Harry Anderson* (Tr. 266-267) of Ephriam, Utah, who testified he used this oil for *one week* for an eczema condition, and noticed no improvement; that he had this condition for two weeks before using the oil; that he then used a home remedy of sulphur and lard and cured this touch of skin trouble.

We might note, in passing, that the Government was so hard pressed to find dissatisfied witnesses, they had to bring this carpenter all the way from Utah to testify as to this very minor case of eczema on which he used the oil for only one week.

The next witness was *Mrs. Hosford* (Tr. 267-269) of Boise, Idaho, who used the oil in July and August of 1941 for psoriasis. She found no improvement and still suffers from this condition. On cross-examination, she said she had suffered for over five years and had gone to various specialists in a vain effort to find relief; that she had been told by them that the medical profession could do nothing for her condition. Her family doctor, Dr. Smith, advised her that, "All we could do is experiment on you, because they have not found anything yet to cure it". (Tr. 269.) She testified that the use of this Colusa Oil made her legs sore. In this connection, it might be noted that while this Government witness testified this oil had an irritating effect, the experts who had never tried it testified that in their opinion it was not an irritant. This witness testified further that after she had used practically all of the oil, she went back to the drugstore and asked for a refund of her money and promptly received it.

The Government then called one *Milne* (Tr. 270-271) from Chicago, a charity patient from the Cook County Clinic, who had suffered from varicose ulcers for twenty-five years. After medical treatment for a quarter of a

century, he tried this oil for *two weeks* on his hopeless case, and noticed no improvement. He finally resorted to surgery. He admitted on cross-examination that it would generally take *six months to a year* for any of his previous remedies or treatments to benefit or improve his condition. *Yet he used Colusa Oil for only two weeks on this hopeless case!*

Mr. Milne was the last of these very few "user" witnesses of the Government. Again we reiterate, the inability of the Government sleuths (after their scouring of the nation) to produce any stronger "evidence" than these few isolated and unimportant cases, presented in rebuttal, is perhaps the most striking and effective tribute to (and proof of) the efficacy of these Colusa products in the treatment of these horrible skin diseases involved in this case. For, had these products not been efficacious in the thousands of cases in which they have been used during the past three years, we undoubtedly would have witnessed a veritable parade of disgruntled users to the witness stand in the lower court. Instead, we find such pitifully weak evidence as that of the Utah carpenter who tried Colusa Oil for but *a week,* and the charity patient from Chicago who tried it for *a couple of weeks* on a hopeless case of leg ulcers.

Having thus defined the controlling issues and briefly reviewed the evidence, we will now undertake to show:

(3) THE INSUFFICIENCY OF THE GOVERNMENT'S EVIDENCE.

The exact state of the evidence can, we believe, be boiled down to a very simple equation. On the one hand, the Government's case consisted practically entirely (insofar as said controlling issues are concerned) of the opinions of these so-called "expert witnesses", not one of whom had even taken the trouble to use or properly test these Colusa products. On the other hand, we find clear-cut and uncontradicted testimony of the many defense witnesses as to the excellent results achieved *in treating*

these very skin diseases with these Colusa products. In short, the Government's case is one of unsupported **THEORY**; the defense proof consists of concrete and undisputed **FACT**.

At the very best, this "opinion evidence" of the Government (if it may be dignified by being called evidence) is the very weakest type of evidence known to the law. The courts have often so characterized it. Here are a few typical expressions:

> "Expert testimony is regarded by the law as the weakest character of testimony." (*Kentucky Traction & Terminal Co. v. Humphrey,* 182 S. W. 854, 856.)
>
> "Such testimony, as has often been held, is of the weakest character and should be received and weighed with great caution." (*Strode v. Strode,* 240 S. W. 368.)

See also, 11 *Ruling Case Law,* 587, § 16, and the many authorities therein referred to.

The reasons for this prevalent attitude of the courts with respect to such "opinion evidence" are well stated in the following authority, viz.:

> "The general and persistent disagreement of authority on many lines of professional and scientific inquiry, the fact that this class of evidence deals so largely with the problematical and the conjectural, and that there are other elements of unreliability arising from human frailty, bias, loyalty to one's employer, pride of opinion, self-interest, or the heat engendered by controversy, which more or less unconsciously warp the mind of the witness even without the more vulgar elements of venality and the absence of any efficient punishment for perjury, have caused courts of the highest eminence to feel that experts are frequently rather the hired advocate of the parties than men of science placing their special experience at the service of the cause of justice. Such courts have naturally characterized this class of evidence unfavorably and have ruled such evidence should be received with 'caution', 'with narrow scrutiny and with much caution', and never received

at all except when absolutely necessary." (17 *Cyc.* 267.)

This strong language which the courts have used in condemning "opinion evidence of experts" is, we respectfully submit, particularly appropriate in our case. Not only are the "opinions" of the Government's experts herein, as to the lack of efficacy of this Colusa Natural Oil, predicated upon a most sketchy and incomplete analysis of this petroleum oil (see p. 11, supra), but they are wholly unsupported by any proper tests of this oil or use of it in the treatment of the skin diseases involved in this case. Is it not little short of startling, your Honors, that the Government, with all of the laboratory and clinical facilities at its command and the vast array of scientists in its various services, *did not put this oil to the acid test by clinically testing it on these skin diseases!*

Under the admitted circumstances, these so-called "expert opinions" of the Government's witnesses are, we respectfully submit, nothing more than "guesses" on the part of these "experts". As such, we believe they well merit the condemnation voiced by the Missouri Court in *Graney v. St. Louis, etc. R. R. Co.,* 157 Mo. 666, 682, 57 S. W. 276, 50 L. R. A. 153:

> "Of course, such testimony, to dignify it by that title, with neither knowledge nor experience on which to base it or with which to back it, is simply worthless; neither courts nor juries are required to believe it. If they do, the esophagi of their credulities must be abnormally dilated or else permanently enlarged. Opinions such as these, grounded on mere conjecture or speculation, are inadmissible. Lawson, Exp. Ev. (2d Ed.) 498 et seq.; Rog. Exp. Test. (2d Ed.) pp. 33, 34, § 13."

In this *Graney* case, supra, the Missouri court reversed a verdict in a death case involving a boy who was killed by defendant's train. The controlling factual issue was whether or not the air currents set up by the passing train

had "sucked" the boy into contact with the train. The plaintiff called, as an expert witness, a college professor, a physicist of twenty-three years' experience in the testing and observation of air currents and their force and effect. This "expert" voiced an opinion that the train could have thus "sucked" the boy into contact with it, and gave his reasons for such belief. The upper court, in thus condemning this "opinion" as a mere conjecture, pointed out that which is true in our case, viz.: the "expert" *made no tests sufficient to give him actual factual data upon which to base his opinions.*

At page 682, the court in the *Graney* case also said:

> "The courts, in our opinion, have gone quite far enough in subjecting life, liberty, and property of the citizen to the mere speculative opinions of men claiming to be experts in matters of science, whose confidence in many cases bears a direct similitude and ratio to their ignorance. We are not disposed to extend this doctrine into the field of hypothetical conjecture and probability. * * *"

And, as Justice Peckham stated, in *Roberts v. N. Y. Elevated Railroad Co.,* 128 N. Y. 455, 28 N. E. 486, in similarly pointing out the weakness of expert "opinion" evidence:

> "It is none the less conjecture and speculation because the expert is willing to swear to his opinion. He comes to the stand to swear in favor of the party calling him, and it may be said he always justifies by his works the faith that has been placed in him."

Such expert opinion evidence is, of course, an exception to the general rule of evidence and should not be encouraged or resorted to except when necessary:

> "Opinions, even expert opinions, are allowed by way of exception to the general rule that a witness is to give the facts observed, but not his conclusions from them, and they are to be allowed only when there is real helpfulness or a necessity to resort to them." (*Hamilton v. U. S.,* C.C.A. 5, 73 Fed. (2d) 357.)

We find, therefore, that the Government's case consists practically entirely of just such "opinion" testimony (conjectures) as is condemned by the foregoing authorities as being the weakest type of evidence.

Arrayed against this flimsy so-called evidence of the Government was the positive and uncontradicted testimony of the various users of these Colusa products, who described in detail, each in his or her own way, the very effective results actually accomplished by the use of these products in the treatment of the very skin diseases involved in this case. These people actually suffered from these very diseases. They well knew and described the horrors and pain of such miserable afflictions. They also well knew and described the quick and effective relief which these Colusa products provided for such misery. *These were facts, not theories.* Mr. Fazio's scaly body was a fact, not theory. Likewise factual, not theoretical, was his subsequent clean skin, cleared up by this Coulsa Oil!

We sincerely believe that it requires little further argument, in view of the state of the evidence, to demonstrate the utter insufficiency of the Government's case. Certainly, your Honors, this so-called evidence of the Government is not sufficient to comply with or fulfill the requirement (under the settled rule of law above referred to) that the guilt of a defendant in a criminal case must be established by competent evidence which excludes every other hypothesis but that of guilt.

Incidentally, the situation in our case is substantially the equivalent of that in *U. S. v. Natura Co.,* 250 Fed. 925. That was a Food and Drug case, tried by Judge Dooling. The Government's case consisted practically entirely of "expert" testimony. After calling attention to the settled rule that in a criminal case the Government must prove the guilt of the defendant beyond a reasonable doubt, Judge Dooling stated that the Government had failed to do this. He therein summed up the situation, in

finding the defendant not guilty, in language quite descriptive of our case:

> "It may be said in a general way that the testimony of the Government was chiefly 'expert' testimony, that is to say, testimony of skilled persons as to the possible effect of the use of Akoz. None of them had ever experimented with it, or tried it either on themselves or others, nor had any of them ever had the opportunity to observe any results from its use. The testimony for the defendant was given by witnesses, physicians and others who had used the medicine themselves, or had observed its effect on others, and all testified to its beneficial effects."

This ruling of Judge Dooling was simply an application of the settled rule of law and common sense that more weight should be given to "factual" as distinguished from "theoretical" testimony. This Honorable Court well expressed this rule in *Overweight Counterbalance Elevator Co. v. Improved Order of Red Men's Hall Assn.* (C.C.A. 9), 94 Fed. 155, at 161:

> "The value of expert testimony generally depends upon the facts stated as a reason for their opinions and conclusions. * * * More weight is given to the testimony of a witness based upon facts within his own knowledge and experience than to the testimony of a witness which is 'largely the assertion of a theory'."

To the same effect:

Stentor Electric Mfg. Co. v. Klaxon Co., 30 Fed. Supp. 425;

Bene v. Jeantet, 129 U.S. 683, 9 Sup. Ct. 428.

And, in connection with the foregoing, it must be borne in mind that at no time did appellants ever advertise or represent that their products would *cure* anything. Nor did the Government allege or attempt to prove any such representation. To the contrary, the very most that the Government charged was that appellants represented their products to be *"efficacious in the treatment of"* these skin diseases. "Treatment" means, of course, *the giving of*

any relief in connection with such diseases. (Tr. 285.) While the undisputed evidence herein clearly shows that this Colusa Natural Oil has actually completely cured and eliminated various stubborn and severe cases of these skin diseases, it would have been sufficient if the evidence had gone no further than showing that this oil merely alleviated or mitigated the itching and irritations incident to said diseases, instead of curing them.

When the facts shown by the record are reduced to their essence, it is seen that the very least that can be said is that appellants have been engaged in distributing to skin sufferers products which are admittedly non-toxic, under a rigid money-back guarantee, protecting the purchasers if these products do not achieve the desired results, products which unquestionably are efficacious in the treatment of these skin diseases.

Frankly, your Honors, is it the spirit or purpose of our law to condemn citizens as criminals under such circumstances as are shown by the record herein? Appellants, dealing with the public in a "fair and square" manner, have brought much needed relief to thousands of skin sufferers. The courts have often pointed out that the purpose of the Food and Drug legislation is to protect the public health and that it is not the purpose of such legislation "to punish merchants who conduct business by customary methods with no intent to deceive purchasers or injure public health." (*Hall Baker Grain Co. v. U. S.* (C.C.A.), 198 Fed. 614.)

We respectfully submit, therefore, that, for the reasons hereinabove set forth, not only does the evidence in our case fail to show the guilt of appellants beyond a reasonable doubt, but, to the contrary, the undisputed factual evidence clearly shows their innocence. This statement applies both to the first and second counts, which, as shown hereinabove, are substantially identical. (See p. 10 supra.) It likewise applies to the first phase of the third count (involving the efficacy of the Colusa Hemorrhoid Ointment). As to this latter phase, it should also be

pointed out that one of the Government's own "experts" (Dr. Tainter) admitted that the Colusa Hemorrhoid Ointment would have a palliative efficacy in treating the itching incident to hemorrhoids. (Tr. 55.)

As to the second phase of the third count (i.e., the omission of "¾ oz." from the label on the jars of hemorrhoid ointment), our position is fully set forth in a subsequent portion of this brief. (See p. 59 infra.) Briefly stated, it is that this omission was entirely inadvertent and unintentional, and occurred through no fault of appellants, and hence did not constitute a crime.

II. THE TRIAL COURT COMMITTED HIGHLY PREJUDICIAL ERRORS IN CONNECTION WITH THE TESTIMONY OF DR. C. E. VON HOOVER, A VITAL DEFENSE WITNESS.

(A) Pertinent Assignments of Error.

Our argument under this major proposition is predicated upon Assignments of Error, Nos. XV, XVI, XVII, XVIII, XIX, and XX, which, because of their length, are printed in the Appendix. (see Appendix, pp. i to viii.) Briefly summarized, said assignments raise the point that the trial court improperly excluded testimony of this qualified pharmacologist directly pertaining to the issue as to the therapeutic efficacy of these Colusa products.

(B) The Facts as to Dr. C. E. Von Hoover, and the Court's Rulings Regarding His Testimony.

Dr. C. E. Von Hoover (Tr. 112-157), from San Antonio, Texas, was one of the most vital witnesses called by the defense. This gentleman, a highly trained pharmacologist, maintains a testing laboratory at San Antonio, Texas, for the purpose of clinically and otherwise testing drugs to determine their therapeutic efficacy. (Tr. 113.) This laboratory represents many national firms for which it does such clinical and laboratory testing of drug prepara-

tions. Among these are such noted firms as Bauer & Black of Chicago, Dermo Laboratories, Emerson Drug Company, Vitamin Research Company, N. C. Goodman Laboratories, and many other nationally known pharmaceutical houses. (Tr. 115.)

In 1942, appellants engaged the services of this laboratory for the purpose of conducting a series of clinical and laboratory tests *to determine the therapeutic efficacy of Colusa Natural Oil (and the other Colusa products) in the treatment of psoriasis and the other skin diseases involved in this case.* (Tr. 132.) Dr. Von Hoover and his clinical staff at this laboratory thereupon proceeded to make an extended series of tests to determine the worth and value of these Colusa products in the treatment of such skin diseases. In addition to other tests, hundreds of persons suffering from psoriasis and the other skin diseases involved in this case, including many patients from charity clinics, were clinically treated by Dr. Von Hoover and his associates with these Colusa products. Associated in these tests and in this laboratory with Dr. Von Hoover, were Dr. Beal, who is Assistant United States Surgeon and United States Public Health Officer in charge of immigration matters at San Antonio; also Dr. A. R. Burchelmann, an examiner and former Health Officer of San Antonio, and past trustee of the American Medical Society; also Major Burby, a veterinary and past trustee of the American Veterinary Association. The latter gentleman is the veterinary consultant for this laboratory.

These laboratory and clinical tests extended over a period of several months, and were concluded shortly prior to the commencement of the trial of this case.

At substantial expense, the defense brought Dr. Von Hoover to San Francisco to testify as a witness in order that he might give the court and jury the benefit of his extended scientific investigation made by him and his asso-

ciates as to the therapeutic efficacy of this Colusa Natural Oil.

Strangely enough, however, the lower court refused to permit this witness to do this. The Government's attorney objected to the proffered testimony of Dr. Von Hoover on the rather amazing ground that he was not qualified to testify *because he was not actually an M.D.* The following are illustrative excerpts, from the record in this case, which will demonstrate the unfair and improper restrictions placed by the trial court upon the testimony of this witness because he was not an M.D., viz.:

> "Mr. Gleason. Q. And in the cases personally observed by you in these clinical tests, in any of these cases did you observe any unfavorable or injurious results from the use of Colusa Natural Oil on these patients?
>
> "Mr. Zirpoli. Objected to as calling for an opinion and conclusion, your Honor, of this witness, who is not a physician and surgeon.
>
> "Mr. Gleason. That is his business, if your Honor please, and profession; he tests drugs.
>
> "The Court. The objection will be sustained.
>
> "Mr. Acton. May we note an exception to that ruling." (Tr. 150-151.)

> "Mr. Gleason. Did you see the Colusa Natural Oil applied to people who had psoriasis in this clinic?
>
> "A. Yes.
>
> "Mr. Zirpoli. Just a moment, I object to that. He is not competent to testify they had psoriasis.
>
> "The Court. Objection sustained." (Tr. 121.)

We respectfully submit that the foregoing attitude and rulings of the trial court were manifestly erroneous. That these rulings were prejudicial, we respectfully submit, is too obvious to require much comment. However, so important is this matter to the defense that, before reviewing the law applicable thereto, we will set forth in greater detail the facts as to the qualifications of this highly trained pharmacologist.

1. *Dr. Von Hoover's qualifications and training as a pharmacologist.*

After his discharge from the American Army, at the termination of the last World War, Dr. Von Hoover studied bio-chemistry for eighteen months at New York City College. He then was awarded the Smedley D. Butler Scholarship and was sent to Kings College in London, where he studied for two years, from 1924 to 1926. At this institution, he studied pharmacology and general science, and received a degree of Master of Science from that college. (Tr. 113.) He then studied at the University of Vienna for two years, under the Smedley D. Butler Scholarship, receiving the degree of Doctor of Science, and also receiving his Ph.D. at Vienna, his courses there covering microbiology, laboratory, pharmacology and general science. He studied *materia medica* at the University of Vienna, *and studied the same courses* as an M.D. (Tr. 113), graduating from Vienna in 1929. In 1930, he organized this clinical testing agency at San Antonio, and has operated this agency ever since, representing many national firms, in pharmaceutical work.

Dr. Von Hoover also testified that in 1923, he worked for the N. C. Goodman Research Laboratory in New York, one of the largest manufacturing and research chemical houses in the United States (and one of his present clients); that he was with them for about a year; that he was part of the clinical staff, testing pharmaceuticals, externally and internally; that this work included analyses and testing of drugs to be used in the treatment of skin diseases. (Tr. 114.) He also testified that in the course of his practice as a pharmacologist, he had submitted various reports to, and testified before, the Federal Trade Commission, both as a witness for the Federal Trade Commission in labelling matters, and otherwise. Dr. Von Hoover also testified in detail as to the methods used by him and his associates in the clinical testing work carried on at his laboratory at San Antonio, including the so-called

animal therapy, which consists in trying out a given drug or preparation on animals, to determine its effectiveness as a germicide or otherwise. (Tr. 118.)

The witness further testified that he had had occasion in the course of his professional training at various colleges, and in the practice of his profession, to study the various skin diseases, and particularly psoriasis (Tr. 125); that he had studied dermatology; that he had had occasion to study the eczema family, of which there are forty types, and had studied varicose ulcers; that as a result of his training in dermatology and clinical testing work in his practice, he was familiar with these various diseases.

2. *Facts as to clinical tests made by Dr. Von Hoover and his associates of Colusa Natural Oil.*

After testifying at length as to his professional training and experience as a pharmacologist, Dr. Von Hoover then proceeded to describe the nature of the tests of Colusa Natural Oil made at his laboratory at San Antonio, Texas. We, counsel for the defense, experienced constant difficulty in trying to lay the foundation in connection with this testimony because the Government's counsel was repeatedly interrupting and objecting, on the score that this man was not competent to testify as to these matters *because he was not a physician and surgeon.* The following is one of the many illustrations of this position and attitude on the part of the Government, viz.:

> "Yes, we made clinical tests in our laboratory and clinic of Colusa Natural Oil and Colusa Hemorrhoid Ointment.
>
> "Q. Without going into details, I want to find out, first, what you did generally in order to test this remedy.
>
> "Mr. Zirpoli. You will have to bring in the doctors that made the test. *You cannot take a man who is not a physician and surgeon,* and who is not competent.
>
> "Mr. Gleason. This man's business is to test drugs."
>
> * * * * * * *

"I made tests of Colusa Natural Oil as a pharmacologist and I have the reports. I also tested the oil on animals. I am not a veterinarian, but I am a graduate of veterinarian life science.

"Q. Did you test the oil on human beings?

"A. Yes.

"Q. First describe the tests that you made of this oil in its application to animals.

"Mr. Zirpoli. I object. He is not qualified to make an application of medication upon animals, or upon humans, and he is not qualified to treat animals or humans." (Tr. 117-118.)

Notwithstanding these and similar objections of the Government, we succeeded at least in having the doctor describe, in an interrupted and broken manner, the nature and extent of the tests made by himself and his associates in their laboratory and clinics at San Antonio. He testified that these clinical tests consisted of two distinct types, first, the so-called "animal therapy" (canine dermatology), and second, tests on human beings. In these latter clinical tests, the oil was applied to various and sundry human cases of psoriasis, athlete's foot, eczema, and the other skin diseases mentioned in the information in this case. He further testified that this clinical testing extended over a period of several months, beginning in April, 1942 and lasting until June 9, 1942; that he personally observed each and every case covered by these tests (Tr. 119) and was present in the clinic when this Colusa Oil was administered to the patients. (Tr. 132.) He further testified that at the completion of the investigation, he sat down and typed a complete report covering the results of these tests, and that this report was based on his own knowledge of the cases referred to; and that he had actually examined each of these cases on every one of the days on which the patient had appeared at the clinic. (Tr. 133.) These original reports prepared by Dr. Von Hoover were produced and marked for identification, and we sought, among other things, to use them for the purpose of refreshing the witness' recollection as to

the detailed facts observed by him in this clinical testing. (Tr. 147.)

The first report (Def. Ex. L for identification) consisted of a detailed report covering the so-called "canine dermatology" tests made by this witness and Dr. Burby, the veterinary, in testing Colusa Natural Oil on skin diseases of dogs. The witness identified this original report, and after the necessary foundational questions were propounded, was asked if it refreshed his recollection as to the facts observed by him in these clinical tests on animals, as to the therapeutic value and power of this Colusa Natural Oil in connection with such skin diseases on dogs. He said that it did (Tr. 147), and thereupon he was asked to state briefly the facts observed by him in these tests, after refreshing his recollection. Thereupon, the Government objected to this, as follows, viz.:

> "Mr. Zirpoli. I want to make this objection, your Honor. He is asked to testify as to the effect of the application of this oil, *which calls for his opinion and conclusion as a veterinarian.*
>
> "The Court. Objection sustained.
>
> "Mr. Acton. Will your Honor allow us an exception to that ruling?
>
> "The Court. Note an exception." (Tr. 147.)

The witness also identified another original report (Def. Ex. M for Identification) which he personally prepared, and which was a report of the clinical results of the use of this oil in physiological tests on human patients in one hundred cases involving the very skin diseases mentioned in the information. He testified that this report contained a statement of the facts observed by him in these clinical tests made by him and his associates on human beings, to ascertain the therapeutic value of Colusa Natural Oil in the treatment of psoriasis, athlete's foot, impetigo, varicose ulcers, hemorrhoids and poison oak and ivy. (Tr. 149.) He was prevented, however, from testifying on the basis of this memorandum because of a Government objection, based upon the claim, among other things, that he

was not competent to testify *because he was not a physician and surgeon.* (Tr. 150.)

Believing that Dr. Von Hoover, this highly trained pharmacologist who had made these extensive tests, was perhaps the best pharmacological authority in the United States as to the efficacy of these Colusa products, the defense also sought to have him give his opinion as to the effectiveness of these products in the treatment of psoriasis and the other skin diseases involved in this case. However, the court, by its rulings, repeatedly prevented such testimony, by sustaining the Government's objections that this man was not qualified to testify *because he was not a physician and surgeon.* The following rulings illustrate this situation, viz.:

> "Mr. Gleason. Q. What is your opinion, Doctor, based upon the many tests made by you in your laboratory and in these clinics, and based upon your training as a pharmacologist, and based on your studies of the science of pharmacology, what is your opinion as to the efficacy of Colusa Oil in the treatment of psoriasis?
>
> "Mr. Zirpoli. I want to interpose an objection, your Honor.
>
> "The Court. Objection sustained. Proceed.
>
> "Mr. Gleason. Note an exception, if your Honor please.
>
> "The Court. Let an exception be noted." (Tr. 128.)

> "Yes, I observed the use of Colusa Natural Oil on a man named Mercurlin, who met a premature death. He was a deputy sheriff.
>
> "Q. What skin disease did he have, Doctor?
>
> "Mr. Zirpoli. I object to that on the ground that this witness is not qualified to testify to that.
>
> "The Court. Objection sustained.
>
> "Mr. Gleason. Q. Do you know what disease he had?
>
> "Mr. Zirpoli. The same objection.
>
> "The Court. The same ruling." (Tr. 127.)

"I remember Mrs. A. Nelly of San Antonio, Texas; she was a housewife, seventy years of age, who had a varicose ulcer.

"Mr. Zirpoli. I object to all of this testimony, first of all, as hearsay, as to her age, and his conclusion and opinion as to her having a varicose ulcer. He is not competent or qualified to testify to that. It may be the fact, but nevertheless, he is not the proper witness for it.

"Mr. Gleason. We submit, if the Court please, the statement that any man who has studied the Materia Medica and who has studied the diseases and taken the necessary and prescribed courses to obtain the degrees this man has, is competent to testify as to whether or not a given condition is a varicose ulcer, or eczema.

"The Court. I will allow him to answer with the hope we will get through soon.

"A. Mrs. A. Nelly is the varicose ulcer.

"The Court. How do you know?

"A. Well, from my experience, your Honor, in the laboratory, and as a doctor of science, and from the knowledge I have of Materia Medica, and dermatology and therapeutics, I determine that.

"The Court. By observation.

"A. By observation, yes sir.

"The Court. That is what you base your testimony on?

"A. That is what I base my testimony on, yes sir.

"The Court. All right, proceed.

"Mr. Gleason. May I have this picture marked next in order for identification?"

Thereupon the photograph was marked Defendants' Exhibit H for identification.

"Mr. Zirpoli. May I ask one other foundational question?

"The Court. You may.

"Mr. Zirpoli. You are not a pathologist, are you?

"A. No sir, I am not a pathologist.

"Mr. Zirpoli. Now I object to his conclusion as to the woman having a varicose ulcer on that further ground.

"The Court. I will sustain the objection and instruct the jury to disregard the testimony.

"Mr. Gleason. May we have an exception?

"The Court. You may have an exception." (Tr. 123-124.)

In other words, one minute the court decides to allow Dr. Von Hoover to testify on this subject and the very next, it reverses itself.

Further excerpts:

"Mr. Zirpoli. I object to his observation of the effect of a medication on a patient. He is not competent to testify to the effect of a medication on a patient.

"Mr. Acton. I don't like to argue after your Honor has ruled, but the law is, I think, your Honor, that a man may observe a person, and may know that a person is undergoing a certain type of medication, because he is undergoing it right in his own home, or in his laboratory.

"Mr. Gleason. Q. Did you see the Colusa Natural Oil applied to people who had psoriasis in this clinic?

"A. Yes.

"Mr. Zirpoli. Just a moment, I object to that. He is not competent to testify they had psoriasis.

"The Court. Objection sustained." (Tr. 121.)

"Q. Were any cases of psoriasis treated in that clinical testing laboratory?

"Mr. Zirpoli. I object to that; he is not competent to testify as to any cases of psoriasis, or their treatment.

"The Court. Objection sustained." (Tr. 125.)

It is apparent, we respectfully submit, from the foregoing, and from the various other rulings of the court in the course of this important witness' testimony, that to all intents and purposes, he was totally destroyed as a witness for the defense in this case.

Incidentally, the court took no pains to conceal from the jury the fact that it considered the testimony of this highly trained expert worthless. Before the defense had hardly begun their examination of this witness, the court admonished:

> "Let us get through with this witness." (Tr. 122.)

This attitude was repeated by the court:

> "The Court. I am going to try to get through with this witness. He may answer it." (Tr. 129.)

We shall now undertake to demonstrate that these objections of the Government and rulings of the trial court that this witness was not competent to testify as an expert because of the fact that he was not actually a licensed M.D. were manifestly erroneous and wholly without merit or legal foundation.

3. *The settled law as to testimony of expert witnesses.*

The law is well settled that *the only true test* as to the qualifications and competency of a person to testify as an expert on a given subject is whether or not his training and experience have been such as to give him a superior knowledge of the subject in question which the ordinary layman does not possess.

Rogers on Expert Testimony, 3rd Ed. 1941, well states this settled principle of law, viz.:

> "In order to permit a witness to testify as an expert, it must appear that by study, practice, experience or observation he has acquired a knowledge of the particular subject inquired about beyond that of the ordinary person." (p. 56.)

> "The test to be applied in determining the competency of a witness to testify as an expert is implied in the definition of expert evidence. He must have acquired such special knowledge of the subject matter either by study of the recognized authorities on the subject or by practical experience, so that he can give the jury assistance and guidance in solving a problem

to which their equipment of good judgment and average knowledge is inadequate. If he can qualify under this test he may testify, otherwise not. The peculiar skill, knowledge or experience which qualifies one to testify as an expert is, as a general rule, that which has been acquired by the witness in his trade, profession or calling." (p. 69.)

"The basis of this type of expert testimony is the fact of peculiar knowledge or skill derived from experience in the particular matter in question." (p. 70.)

American Jurisprudence states the settled law on this subject in substantially the same way, and collects many of the host of cases exemplifying this rule. (See 20 *Am. Jurisprudence,* p. 656, § 783.) It also adds the following:

"Although a witness, in order to be competent as an expert, must show himself to be skilled or experienced in the business or profession to which the subject relates, there is no precise requirement as to the mode in which skill or experience shall have been acquired. Scientific study and training are not always essential to the competency of a witness as an expert. A witness may be competent to testify as an expert although his knowledge was acquired through the medium of practical experience rather than scientific study and research." (20 *Am. Jur.*, p. 657, § 784.)

In the recent case of *Farris v. Interstate Circuit* (C.C.A. 5—1941), 116 Fed. (2d) 409, 412, the court in ably summarizing the law as to "experts", stated:

"An expert is not permitted to state his opinion on a matter of common knowledge; nor can he give his opinion as to conclusions from facts within his special skill or knowledge when that opinion answers the precise question for determination by the jury."

"An expert is one who, by study or practical experience, has acquired a knowledge or skill or understanding of certain facts beyond that of the average man."

The following are a few of the many cases illustrating the application of the foregoing rules of law. We have endeavored to select a few cases involving testimony, as to bodily ailments, by experts who were not actually M.D.'s, viz.:

In *People v. Cox,* 340 Ill. 111, 172 N.E. 64, 66, 69 A.L.R. 1215, it was contended that the court erred in permitting a chemist to testify that the quantity of wood alcohol which he found in Easley's stomach was sufficient to cause death. On appeal the court stated,

> "The objection is that the witness lacked the requisite qualifications to testify upon the subject and that a doctor of medicine should have been called for the purpose. The witness had made a special study of chemistry, had received the Master's and Doctor's degrees in that branch of learning and had been the head of the Department of Chemistry at the Bradley Institute at Peoria for twenty-eight years. *Although this witness was not a doctor of medicine,* he was clearly qualified to testify concerning the effects of a given quantity of wood alcohol in the human stomach upon human life." (Italics supplied.)

In *Dickey v. Western Tablet Co.,* 218 Mo. App. 253, 267 S.W. 431, 434, it was insisted that the court erred in permitting plaintiff's expert witness, Dr. Thomas, to testify that copper was infectious when it came in contact with wounds or abrasions of the skin, for the reason that the doctor was not qualified as an expert to give an opinion on the subject. This objection was based on the fact that Dr. Thomas was an analytical chemist and not a therapeutic chemist. He stated that he had studied therapeutic chemistry in a general way but had never practiced medicine. The court, on appeal, stated:

> "We think that an analytical chemist with the experience in copper and other metals that this witness had, together with his general knowledge of therapeutic chemistry, made him competent as an expert witness in reference to the poisonous effect of copper."

In *Greengard v. Odorono Co.,* 256 N. Y. Supp. 708, the court ruled,

> "The evidence of the chemist, Dr. Pozen, concerning the result of the application of certain chemicals in a solution to the human skin was admissible and was improperly excluded."

Jones on Evidence, Vol. 3, page 2469, very effectively points out that the mere fact that a person *is a physician* does not necessarily qualify him to testify as an expert concerning poisons in the human system, viz.:

> "Thus it is that chemists and physicians who are qualified by proper study and experience, may testify to the nature of poisons and their effect on the system and the symptoms which they produce. But the fact that the witness is a physician does not necessarily qualify him to testify as an expert concerning the presence of poisons in the human system, *since he may be wholly lacking in the requisite knowledge of chemical science."* (Italics ours.)

In *Scott v. State,* 141 Ala. 1, it was claimed that the witness Ross, a chemist, was not qualified to testify because he was not a pathologist. On appeal, the court stated that it had been shown that Dr. Ross was a chemist and toxicologist of long standing, "by which is necessarily implied that he was acquainted with poisons and their effects and antidotes, and the effect of excessive doses of medicine. There is nothing in his testimony which was not properly received * * * *and this though he was not a druggist nor a pathologist."* (Italics ours.)

In *Reynolds v. Davis,* 179 Atl. 613, 614, the question involved was as to whether or not a person who was a trained toxicologist could testify as to the effects of a solution of oxalic acid upon human beings. Like Dr. Von Hoover in our case, this toxicologist had studied *materia medica.* The court stated on appeal:

> "In our judgment there was sufficient evidence to justify the trial justice in so ruling, especially in view of the fact, shown by the evidence, that the witness' experience had covered the effect of oxalic acid upon

other human tissues, including the skin, and that the tissues of the human eye are soft and very sensitive."

In *State v. Cook,* 17 Kan. 392, the question involved was whether or not a chemist who had made the analysis of the stomach of a decedent would be allowed to testify as an expert concerning the effect of strychnine on the human stomach and the human system, even though he was not a physician and surgeon. The court ruled:

"The effects of poison upon the human system comes within the scope of the science of toxicology."

In *Thaggard v. Vapes,* 218 Ala. 609, 119 Sou. 647, the witness, Dr. Vapes, testified that he was a practicing dentist; that he was a graduate of a dental college, and in the study of his profession he had taken substantially the same course in chemistry, as to the effects of drugs on the human system, as is given to physicians; and that as a result of his study and practice he knew the effect of arsenic on the human body. The court in that case said:

"This, under the decisions of this court, qualified him to testify as an expert, leaving the weight of the testimony to the jury. (Citing cases.) Chemists and physicians who are qualified by study and experience may testify as to the nature of poison and its effects on the system."

4. *Application of said rule of law to Dr. Von Hoover:*

It cannot be disputed, of course, that Dr. Von Hoover was and is a highly trained pharmacologist. The record plainly and indisputably shows his long training and experience in this field of science. In short, he not only has the requisite technical and scientific training, but likewise has had a vast practical experience in the pharmacological field. Nor can it be disputed that pharmacology *is the very branch of medical science which treats of the very subject involved in the fundamental issues in this case, i.e., the therapeutic efficacy of drugs.* Nor can it be denied that this witness and his associates made a most detailed and exhaustive study and clinical tests of the

products involved in this case, to determine their efficacy *in the treatment of the very diseases involved in this case.* We therefore respectfully submit that it is too clear for argument that the trial court plainly erred in excluding the testimony of this important witness. As a matter of fact, we believe that the very argument made by counsel for the Government in this case, and the testimony of the Government's own witnesses clearly demonstrate the incorrectness and unjustified nature of the court's rulings with respect to this eminent pharmacologist, viz.:

Early in this case, when the defense objected to the testimony of Dr. Maurice K. Tainter, a pharmacologist called by the Government, Government's counsel answered with an argument which we believe very aptly sums up the situation with respect to Dr. Von Hoover, viz.:

> "Mr. Gleason. We object, if the court please, that no foundation has been laid. We would like to have the doctor state whether or not he ever applied the oil to such a condition. Have you ever applied that oil to a condition of poison oak?
>
> "Mr. Zirpoli. I can cite innumerable cases under the Federal Food and Drug Act, your Honor, which provide that *when a man who is a scientist particularly learned in a particular field takes the stand, he is competent to testify about those matters for which he is specifically trained by reason of his learning and his instruction and his scientific training.*" (Tr. 57.)

Notwithstanding this argument of able counsel for the Government, made in presenting *his* case, he saw fit to later reverse his position and advance the palpably unsound contention that such a scientist could not testify unless it was first shown that he is duly admitted to the practice of medicine.

And in connection with the foregoing, it must be remembered that the science of pharmacology is, as is shown by the testimony of this same Dr. Tainter,

> "* * * the subject dealing with drugs and medicines and their application to the treatment or cure of

> disease; it can be expanded to include research, investigation of drugs, development of new drugs, the study of toxic effect of them, the treatment of poisoning and various related subjects of that sort." (Tr. 50.)

In *Lutz v. Houck,* 263 N. Y. 116, 188 N. E. 274, the court also defines pharmacology, as follows:

> "Pharmacology is the science that treats of drugs and medicines, their nature, preparation, administration and effects."

We respectfully submit, therefore, that said rulings and attitude of the court with respect to this vital defense witness were plainly erroneous, and that the prejudicial nature of these rulings is likewise manifest.

Incidentally, it should be noted that the defense made every effort to convince the court of the erroneous nature of its rulings with respect to Dr. Von Hoover. (Tr. 131.)

III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO ADMIT IN EVIDENCE THE TESTIMONIALS OFFERED BY THE DEFENSE.

(A) Pertinent Assignment of Error.

This phase of our argument is predicated upon Assignment of Error No. XXII (Tr. 353), which, because of its length, is printed in the Appendix. (See Appendix, p. viii.) This assignment asserts that the Court erred in refusing to admit in evidence the testimonials offered by the defense. (Exhibits Q and Q-1 for Identification, see Tr. 181-250.)

(B) These Testimonials Should Have Been Admitted in Evidence.

Hereinabove in our analysis of the information (see p. 9, supra), it is shown that the information purports to quote *certain statements* from the advertising matter of appellants. Then the information alleges that *these statements were false and misleading.*

Included in these *allegedly false statements,* thus quoted by the Government, is the statement:

"Colusa Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external Acne, Eczema, Psoriasis," etc.

In order to meet this charge, the defense sought to show the truth of this and various others of these said statements thus quoted in the information and alleged by the Government to be false and misleading; but was prevented by the court from so doing.

With respect to the above quoted statement (i.e., that other users had credited Colusa Natural Oil with various beneficial results, etc.), the defense sought to prove the truth of this by offering in evidence a large number of voluntary testimonials received by defendants from the users of these Colusa products. In other words, the defense sought to prove the *literal and complete truth of this very statement in their advertising matter,* which the Government attacked as *false and misleading.* Yet the court, by its rulings, absolutely prevented the defense from making any such proof, viz.:

"Mr. Gleason. You heard me read, Mr. Colgrove, a statement from the information in this case with respect to other users crediting various and sundry things, a statement contained in some of the advertising matter. Upon what did you base that statement?

"Mr. Zirpoli. Same objection, irrelevant, incompetent and immaterial.

"The Court. Objection sustained.

"Mr. Doyle. I desire an exception, if the Court please." (Tr. 250-251.)

"Mr. Gleason. Q. In the information, Mr. Colgrove, there is a statement set forth, 'Colusa Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete's foot or ringworm, poison ivy, varicose ulcers, burns and cuts.' You have been marketing

this oil for approximately two or three years, as I recall your testimony. *Upon what did you base this statement that is contained in this information, the statement just read?*

"Mr. Zirpoli. I object, your Honor, it is irrelevant and immaterial as to what he based it on; *all that matters is the fact that the statement is there and the statement speaks for itself.*

"Mr. Gleason. In this information are various statements quoted from the advertising matter. Counsel has submitted to your Honor instructions, that we desire to argue, to the effect that if any false statement is contained in any portion of the advertising matter, the mats or otherwise, that this man can be convicted. We desire to show the truth of this statement. We desire to show that when Mr. Colgrove said that 'Colusa Natural Oil is credited by other users' he was telling the truth, and we desire to submit to your Honor hundreds of testimonials in regard to this product, received from users * * *

"The Court. Testimonials cannot go into evidence here.

"Mr. Gleason. I don't want you to think I am going contrary to your ruling. I make the statement, I make it as an officer of this court, that I believe under this information, under settled principles of law——

"The Court. You may believe whatever you see fit.

"Mr. Gleason. May I present the law to your Honor on that subject?

"The Court. No, we will proceed. You may make your offer of proof, and you will have a record to protect you, and I will rule." (Tr. 176-177.)

Counsel for defense then made an offer of proof (Tr. 178-179), which is set forth in the Appendix hereto. (See Appendix, p. ix.) The Government's reply to this offer of proof is, we believe, quite interesting:

"Mr. Zirpoli. If I might respectfully submit, your Honor, as I have heretofore had occasion to state in arguing various points before the Court, that there was no element of fraud or bad faith involved; it is a

simple case of misbranding, and that therefore testimonials are not admissible in evidence. Had this been a fraud case, then the position taken by counsel would have been a proper one, but this is a misbranding case and not a case predicated upon fraud or fraudulent intent." (Tr. 179.)

In short, the Government concedes that if appellants had been accused of *fraud* in making these allegedly false statements in their advertising matter, these testimonials would clearly have been admissible.

Said argument of the Government wholly misses and sidesteps, we respectfuly submit, the point that inasmuch as the Government saw fit to charge that appellants had made certain allegedly *false* statements, simple justice dictated that appellants have *the right to show the truth of such statements.* This, the court, by its said rulings, prevented. In other words, the defendants, while accused by the Government of making false statements to the public, are not to be permitted to prove the truth thereof! What a queer jurisprudence it would be which would permit such an anomalous procedure! Certainly, plain and elementary principles of justice require, under such circumstances, that the defendants be given the fullest opportunity to prove the truth of these statements alleged to be false.

Had the defense been permitted this opportunity, they would have, by the introduction of these testimonials, shown that when appellants stated in their advertising matter that other Colusa users had credited Colusa Oil with remarkable results, they stated *the literal truth,* viz.:

EXCERPTS FROM PROFFERED TESTIMONIALS.
(Def. Ex. Q-1 for Identification.)

"Much to my amazement it completely cured a skin disease I had had for over three years. * * * I went to the finest skin specialists in New York and have probably paid out several hundred dollars for x-ray

treatments and just about every sort of salve or lotion the human mind could conceive."

Karl Pettit, New York City. (Tr. 182.)

"Find it the most beneficial product I've ever used."

Mrs. J. C. Erkman, Duluth, Minn. (Tr. 187.)

"It worked like a miracle on my skin—all the red, rough skin disappeared in three days * * *"

Mrs. E. Rasmussen, Washington, D. C. (Tr. 193.)

"Your oil has practically cleared up a nasty case of eczema for me."

Naomi Ford, Baltimore, Md. (Tr. 187.)

"Your product was marvelous. Now I am back to work as a masseuse in Hollywood. It will be a tough grind with those terrific doctor bills. Many people have been astonished because my leg ulcer finally healed."

Miss E. Tuomala, Hollywood, Calif. (Tr. 206.)

"I just can't find words to express my praise of this wonderful Oil and Capsules, as I had spent hundreds of dollars and no success as my leg just kept breaking out and itching; but with this first $6.00 treatment all itching gone and healed entirely up."

Steve Buckrom, Washington. (Tr. 217.)

"My hands for three years have come gradually to be like those described in the 'Story of the Hands'. I used one-half a bottle of the oil and my hands cleared up in one week."

Mrs. Ned Fortney, Kansas City, Mo. (Tr. 231.)

"I hardly know how to express my appreciation for such a remarkable remedy."

Mrs. Hardin, Richmond, Va. (Tr. 196.)

"I never believed in magic before but do now."

Miss Mary Doe, Higginsport, Ohio. (Tr. 240.)

"It is really remarkable. Thanks to your wonderful products, I now have a clear normal skin, and plan to be married in June. To all skin sufferers who really want relief I highly recommend your products. You shall be my friend for life."

Miss Estell Hill, Arlington, Texas. (Tr. 245.)

"Surely a product of that sort should not be taken away from suffering humanity."

F. O. Burckhardt, Seattle, Wash. (Tr. 197.)

Etc., etc., etc. (See Def. Ex. Q-1 for Ident., Tr. 181-249.)

The foregoing and the many other remarkable tributes contained in these testimonials, to the efficacy of these Colusa products, well demonstrate, we sincerely believe, the accuracy and truth of the aforementioned assertion in appellants' advertising matter, which the Government alleged to be false.

Furthermore, these testimonials, when considered in conjunction with various other undisputed facts, showed that the public was not misled by appellants' advertising matter. (See p. 76, infra.)

IV. THE THIRD COUNT IS DUPLICITOUS.

(A) Assignment of Error.

The pertinent Assignment of Error is No. VI, reading as follows:

"The Court erred in denying appellants' motion to compel the Government to elect as to which of the two separate alleged offenses set forth in Count Three it desired to submit to the jury; said count contained two distinct charges and the court should have compelled the Government to elect between these two. Said ruling was duly excepted to." (Tr. 335.)

(B) Count Three Charges Two Separate and Distinct Offenses.

(1) The legal test as to duplicity.

Duplicity is:

"The joining in one count of two or more distinct offenses."

Creel v. U. S. (C.C.A. 8), 21 Fed. (2d) 690.

It is an elementary rule of criminal pleading that a count which joins two or more distinct offenses is bad and vulnerable for duplicity.

31 *Corpus Juris,* § 321, p. 758;
State v. Smith, 61 Me. 386;
U. S. v. Blakeman, 251 Fed. 306;
U. S. v. American Naval Stores Co., 186 Fed. 592;
State v. Young (Mo. App.), 215 S. W. 499.
Ammerman v. U. S. (C.C.A. 8), 216 Fed. 326.

The early case of *State v. Smith,* supra, one of the leading authorities on duplicitous criminal pleadings, ably sums up the law on this subject, viz.:

> "No rule of criminal pleading is better established than that which prohibits the joinder of two or more substantive offenses in the same count. A substantive offense is one which is complete of itself, and is not dependent on another. * * * The jury cannot find a verdict of guilty as to one part and not guilty as to another part of the same count. This strictness of pleading is necessary in order that the accused may not be in doubt as to the specific charge against which he is called upon to defend and that the court may know what sentence to pronounce. * * * When two or more independent offenses are joined in the same count it will be bad for duplicity. * * * The evidence might warrant a conviction upon one of the offenses charged, but not upon the others. But the jury cannot split up a count in one indictment and find the accused guilty of a part and not guilty of the balance; their verdict must be an entirety."

In *U. S. v. American Naval Stores Co.,* supra, the court stated:

> "It is elementary that two separate offenses cannot be included in one count of an indictment. Besides, it is important that the defendant should know whether the Government will proceed to prove that the defendants monopolized or attempted to monopolize. I think there is clearly a distinction between the two, and, although there is not any different punishment provided, the count is bad for duplicity and for lack of certainty."

In *Ammerman v. U. S.,* supra, the Circuit Court of Appeals for the Eighth Circuit, in reversing (because of a duplicitous indictment) a conviction in the lower court, used language which aptly describes the dilemma which exists in our case because of the duplicitous third count, viz.:

> "Perhaps no better illustration of the danger of permitting such an indictment to stand can be found than this case affords. The verdict of the jury finds the defendant guilty as charged in the indictment. Does this mean that the defendant was guilty of violating the Act of 1895 or the Act of 1897?"

State v. Young, supra, likewise effectively illustrates the vice and unfairness of a duplicitous count. The defendant was charged in one count of unlawfully practicing medicine, attempting to treat the sick, and advertising that he was authorized to treat the sick. A general verdict of conviction followed. The court instructed the jury they could find the defendant guilty if they believed the defendant did practice medicine, or did attempt to treat the sick, or did represent and advertise himself that he was permitted to practice medicine. The appellate court said (215 S. W. at 500):

> "The statute provides for three separate and distinct offenses, and, the defendant in this case being charged with all three of the offenses, the verdict should have been specific as to whether he was guilty of one or the other or all of them. *As the matter was submitted to the jury, some of the jury may have believed him guilty of one of the offenses, and some of the other. The defendant is entitled to have twelve men believe him guilty of either one or all of the stated violations of the statute.*" (Italics ours.)

The foregoing authorities also show that the legal test as to whether one offense or more than one is embraced in a given information or indictment is whether or not the *same set of facts,* when proved, will suffice to support the various phases of the charge. In other words, if the count in question contains various phases, and proof of one

requires proof of facts not essential to the other phase, two offenses are charged and the count is bad for duplicity. (See also *Dimenza v. Johnston* (C.C.A. 9—1942), 130 Fed. (2d) 465.)

It is likewise well settled that:

> "Duplicity is not a mere technical defect, but is one of substance and a judgment can and should be reversed if said element is present and properly objected to." (*Creel v. U. S.*, supra.)

(2) Application of said legal principles to Count Three.

Applying said legal principles to Count Three, it is plain, we respectfully submit, that said count encompasses two wholly distinct and separate alleged offenses; the first (Tr. 10-11) being an alleged misrepresentation to the public as to the therapeutic efficacy of the Colusa Hemorrhoid Ointment; the second being simply a charge that a certain weight designation (i.e., "¾ ounce") was omitted from the jar label.

Obviously, the proof of the second charge would not at all consist of facts sufficient to prove the first. To the contrary, proof of the second charge would simply require evidence to show that a certain jar of drug was shipped in interstate commerce with a label *not containing a weight designation.* Such proof (unless explained in some legitimate manner by the defense) would be sufficient to justify a conviction. Such proof, however, would have nothing to do with (and would not involve any proof as to) the efficacy or inefficacy of the drug contained in said jar.

Furthermore, the distinction between these two offenses encompassed by the third count has an important practical aspect which we are confident your Honors will readily recognize. The first charge, being one of misrepresentation to the public, is a serious one, directly affecting and involving appellants' business reputation and integrity. In short, a conviction on this charge is a very important matter to appellants.

On the other hand, the second phase of Count Three constitutes, at the most, a very technical alleged offense, one not at all involving any misrepresentation to the public. The mere fact that the weight designation, "¾ ounce" was omitted from the label *would not mislead or fool the public at all.* In fact, the Federal Food, Drug and Cosmetic Act (Section 5026) provides that certain labels on small packages may be entirely exempted by the Secretary of Agriculture from this technical requirement of weight, etc. designation.

Now, a conviction under this confusing and dual third count leaves the entire matter in a muddled state. It is impossible to tell from such a result whether the defendants were convicted of the first and serious phase aforementioned (duping the public), or the second and technical phase aforementioned (label omission), or both. For example, let us assume that the jury were satisfied that, *as to the first phase,* appellants, because of their clear-cut and uncontradicted evidence as to the efficacy of Colusa Hemorrhoid Ointment in relieving the itching incident to hemorrhoids, were entitled to an acquittal, but, *as to the second phase,* were to be held culpable. How could the jury accomplish this under this Count Three?

Stating the matter a little differently, it is impossible to tell from the verdict of the jury in this case whether the jury intended to convict appellants under the first or second phase, or both. The settled rule as to duplicitous counts has for its purpose the prevention of just such anomalous situations.

The motion to elect is a proper method by which to attack a duplicitous count. (*Lemmon v. U. S.* (C.C.A. 8), 164 Fed. 953; 31 *Corpus Juris,* p. 790, § 360; *Pointer v. U. S.,* 151 U.S. 396, 145 S. Ct. 410.)

The defense duly moved, upon the completion of the evidence, to compel the Government to so elect (Tr. 274), and pointed out to the court at length the aforesaid legal considerations with respect to said count. This motion was denied, which ruling was duly excepted to.

V. THE TRIAL COURT COMMITTED VARIOUS OTHER PREJUDICIAL ERRORS IN THE TRIAL OF THIS CASE.

Under this heading, we will briefly argue various matters occurring at the trial of this case, which we submit fall within the category of prejudicial errors.

(A) Refusal to Permit Defense to Show that the Omission of Certain Quantitative Designations from the Label Involved in the Third Count Was Entirely Inadvertent.

Pertinent Assignment of Error: This point is based upon Assignment No. XXI. (Tr. 351; Appendix p. xii.) This assignment asserts that the court erred in preventing the defendants from introducing evidence to show that the omission of the weight designation on the label involved in the second phase of the third count was inadvertent and unintentional.

Argument: As shown above, the second phase of the third count charges defendants with a crime because the label on the jars of hemorrhoid ointment did not contain a designation of the weight of the contents of said jars ("¾ ounce"). To explain this omission, defendants sought to show that the omission of said weight designation was entirely inadvertent. To so demonstrate, appellants sought to prove, by competent evidence, that shortly prior to this shipment to New Mexico the supply of labels used on such jars became exhausted, and a new supply was ordered from McCoy Label Company, a reputable San Francisco label printing concern; that with this order, appellants submitted to said printing concern a "copy" of the desired label *containing the correct designation of the weight of the contents,* and instructed the printer to print the new labels in accordance with this "copy"; that due to a mistake of McCoy Label Company, this designation of quantity was omitted, and, due to this inadvertence, a few jars of ointment were sent out with such incomplete labels; and that shortly thereafter, this inadvertence was discovered and appellants immediately destroyed this large supply of labels and ordered an entire new supply with the correct designation of the weight upon them.

The defense sought to prove these facts by several different types of evidence. They sought to prove them by the testimony of a representative of McCoy Label Company, who was present in court and ready to testify as to all of the foregoing facts. Because of previous rulings of the court, and in the interests of time, the testimony of this witness was covered by stipulation. (Tr. 352-353.)

The defense also sought to prove these facts by the testimony of the defendant Colgrove (Tr. 168-175), but the court refused to permit such proof.

We also produced and offered in evidence the original letter sent by Mr. Colgrove to McCoy Label Company, constituting the actual order for these labels. The Government's objection to this was sustained, and the letter was marked as Defendants' Exhibit P for Identification. (Tr. 172-175.) In this letter, a specific instruction is set forth requesting the inclusion of the designation "contents ¾ oz." The previous jars (and labels) contained different weights, hence this specific instruction was sent by appellants to McCoy Label Company to cover this change in weight. (This letter is set forth in the Appendix, p. xxviii.)

The law as to criminal intent: In order to constitute an act as a crime, there must of course be a knowledge on the part of the accused that he is doing the forbidden act or, at least, such negligence on his part that the law will deem that he actually knew that he was doing the forbidden thing.

The general and well settled principle of law upon which we rely in this connection is stated in *Corpus Juris* as follows:

> "General Rule. Where one in ignorance or mistake as to fact commits an act which but for such mistake would be a crime, there is an absence of the malice or criminal intention which is generally an essential element of crime, and the general rule therefore is that such ignorance or *mistake of fact* will exempt one from criminal responsibility, provided always there is

no such fault or negligence on his part as supplies the element of criminal intent." (16 *Corpus Juris,* Sec. 53, p. 85, and cases therein cited.) (Italics ours.)

We submit, therefore, that the defendants should have been permitted to show that this label omission was entirely inadvertent and through no fault of theirs, and that the label in question was sent out inadvertently and in ignorance of the true facts.

(B) The Court Erred in Refusing to Permit Appellants to Prove the Truth of Certain Statements Which the Government Attacked as False.

Pertinent Assignment of Error: This point is predicated upon Assignment No. XXIV. (Tr. 359; Appendix p. xiii.) This assignment asserts that the court erred in refusing to permit the defendants to show the truth of a certain statement made in their advertising matter and alleged to be false.

Argument: Among the various statements quoted in the information and alleged to be false was a certain statement regarding radium emanations, viz.:

"Radium emanation is accepted as harmoniously in the body as is sunlight by the withering plant."

"The emanation is taken up in the blood and as quick as lightning, goes to all parts of the body where it kills or checks the disease germs."

The information was unfair to appellants in this connection, because the actual statement contained in the newspaper mat was and is:

"This Colusa product carries about 4% of Iodine * * * nitrogen gas and radium emanations—but NO RADIUM. *Science papers by eminent physicians state that,* 'Radium emanation is accepted as harmoniously in the body as is sunlight by the withering plant, etc.' " (Tr. 27.)

The Government omitted in the information the portion italicized in the foregoing quotation.

In other words, appellants did *not* compose these statements as to the effect of radium emanations, or insert them in this advertising matter as *their* statements. They simply stated that: "Science papers by eminent physicians state that, etc."

Yet, when appellants sought to prove the source of these statements and sought to show that eminent scientific authorities had so stated, the court and Government blocked such proof, viz.:

(The witness Colgrove):

"I did not compose the statement, 'The emanation is taken up in the blood and as quick as lightning goes to all parts of the body where it kills or checks the disease germs.' Nor did I compose this statement, 'Science papers by eminent physicians state that' followed by quotation. I copied them from a source I relied on as being authoritative. I have a copy of those quotations with me." (Tr. 162.)

"Mr. Gleason. Do you have available, Mr. Colgrove, the statement upon the basis of which these statements were incorporated in the newspaper mat with respect to the efficacy of radium through the body. Can you give counsel the authorities from which that was procured?

"A. Yes, sir.

"Mr. Zirpoli. I object to that. Authorities as given by this witness are irrelevant and immaterial.

"Mr. Doyle. May he answer the question, if your Honor please?

"The Court. What question?

"Mr. Doyle. The question as to the source from which he obtained this statement which appears quoted in the mat. It appears as quoted.

"The Court. It matters very little the source of the information or where it came from. We are not concerned with the source of it.

"Mr. Doyle. Exception, if your Honor please." (Tr. 251-252.)

Certainly, we respectfully submit, common justice demands and requires that appellants be given a chance to

prove the accuracy and truth of this statement which the Government claims to be false.

Another instance of this very same type of ruling is covered by Assignment No. XXXIV (Tr. 371; Appendix p. xiv) which covers the following. One of the statements quoted in the information from appellants' advertising matter (and alleged to be false) was the statement that in order to secure one gallon of this medicinal oil it is necessary to pump thousands of gallons of water. (Tr. 6.) Yet, when the defense sought to prove the truth of this statement by testimony of a very competent witness who actually had operated these wells and had been in charge of such operations for several years, the court and Government precluded such proof. (Tr. 160.)

(C) The Court Erred in Permitting the Government to Interrogate Dr. Tainter on Certain Subjects Without Any Proper Foundation Having Been Laid.

Pertinent Assignment of Error: This point is predicated upon Assignment No. XXXI. (Tr. 367; Appendix p. xv.) The assignment asserts that the court erred in permitting Dr. Tainter to testify as to the effect of the application of Colusa Oil in poison oak cases.

Argument: We have hereinabove shown that the question as to the efficacy of this oil in the treatment of poison oak and other skin afflictions was the fundamental issue in this case. We have likewise shown how narrowly the court restricted the examination and testimony of Dr. Von Hoover, a scientist who had made very careful and exhaustive clinical and laboratory tests of this oil.

We find, however, that the court permitted the Government great latitude in asking its so-called experts for testimony on this vital issue. For example, Dr. Tainter was permitted to testify as to the effect of the application of this oil in poison ivy, without the slightest foundation first having been laid to show that he had made any such test, viz.:

"Poison Ivy is a burning of the skin by means of an oil secreted by the poison ivy or poison oak plants. The oil gets on the skin from contact with the plants out in nature, in the fields or in the woods, and then produces itching and burning and blistering, depending on the degree of the contact that occurs.

"Mr. Zirpoli. What is the effect of the application of oil such as the oil here on the skin?

"Mr. Gleason. We object, if the court please, that no foundation has been laid. We would like to have the doctor state whether or not he ever applied the oil to such a condition. Have you ever applied that oil to a condition of poison oak?

"Mr. Zirpoli. I can cite innumerable cases under the Federal Food and Drug Act, your Honor, which provide that when a man who is a scientist particularly learned in a particular field takes the stand, he is competent to testify about those matters for which he is specifically trained by reason of his learning and his instruction and his scientific training; and furthermore, there are innumerable cases that say that the particular doctor need not even have applied the particular product involved or have used or seen it if he knows its constituent, component parts and has been given the necessary foundation therefor. And that has been done, because we have told the doctor what this stuff consists of, and the doctor himself has seen it, and from his scientific medical knowledge he can give his opinion as to what the effect would be.

"Mr. Gleason. If the Court please, we doubt very seriously whether counsel can produce any case covering testimony of this type. We would like to ask one question, if we may, for foundational purposes, and that question will be whether or not the doctor has ever applied oil of this type to that kind of a disease.

"The Court. The Court is prepared to rule.

"Mr. Zirpoli. That is cross-examination.

"The Court. The Court is prepared to rule. You may develop that on cross-examination. The objection will be overruled.

"Mr. Acton. Will your Honor allow us an exception?

"The Court. Yes." (Tr. 56-58.)

We are confident that it takes no extended argument on our part to convince this Honorable Court of the fact that when it comes to oils and hydrocarbons, a most intricate and complicated chemical family (or families) is present. The record (including testimony of the Government's own witnesses) plainly shows this. As Webster tersely sums up the situation, "Petroleum consists of a complex mixture of various hydrocarbons, and varies much in appearance, composition, and properties". A reference to Webster's New International Dictionary and the tables therein contained as to the various general groups of products obtained by the fractional distillation of petroleum will indicate the extreme complexity of the chemistry encompassed by the simple word "petroleum". The hydrocarbons literally have thousands upon thousands of chemical ramifications. From this myriad of molecular arrangements which we know as oils (hydrocarbons) issue such seemingly dissimilar things (to mention but a few) as rubber, dyes, gasoline, medicinal oil and the wonderful sulfa drugs. As the Government witness Buell admitted on cross-examination, the hydrocarbon symbol, C_2H_5OH, stands for sixty-four varieties of compounds found in petroleum oil. (Tr. 29.)

Bearing in mind this highly complicated nature of petroleum, it was, we respectfuly submit, highly prejudicial for the court to permit this witness to testify as to the effect of this particular oil (i.e., the very issue in this case) without so much as a showing that the witness has the necessary *knowledge* of the particular oil in question to enable him to testify.

The authorities cited hereinabove with respect to the use of so-called "expert testimony" all are in accord on the point that before an "expert" can testify with respect to a given subject, a foundation must be laid to show that such "expert" is qualified, *by virtue of proper study of that very subject,* to express an opinion with respect thereto. After all, the law should not and does not permit

a man's liberty and honor to be jeopardized by a guessing game by so-called "experts"!

(D) The Court Erred in Permitting the Witness Dr. Tainter to Testify as to This Oil Being an Ordinary Crude Oil.

Pertinent Assignment of Error: This point is covered by Assignment No. XXVIII (Tr. 364; Appendix p. xvi), which assignment asserts that the court erred in permitting the Government to ask Dr. Tainter to compare Colusa Natural Oil with "ordinary crude petroleum" without laying a proper foundation to show that Dr. Tainter was qualified to make such a comparison.

Argument: The following excerpt from the record illustrates this particular phase:

> "Mr. Zirpoli. Q. Doctor, from your examination of this product, was it any different, from your own experience from ordinary crude petroleum oil?
>
> "Mr. Gleason. Just a moment. If the court please, we object to that on the ground that it is incompetent, irrelevant and immaterial; that no proper foundation has been laid. And we stress this objection, if the court please, for the reason, as has already been brought out, there are thousands of different types of crude oils with thousands of different constituents, and for a blanket assertion to be made of this type is utterly unfair. If the court please, we submit this: if the doctor wants to testify as to the crude oils that he has had experience with, he should give us the formulas and the designations, paraffine, asphalt or otherwise, and then compare this oil with them. Then we have some facts.
>
> "The Court. The court is prepared to rule.
>
> "Mr. Acton. Will your Honor allow us an exception before the answer?
>
> "The Court. Note an exception." (Tr. 53.)

For the same reasons which we have argued immediately hereinabove under Point (C), this ruling of the court was, we respectfully submit, erroneous and prejudicial.

It might be added that there was no proper foundational proof to show that Dr. Tainter was a petroleum engineer,

or had any such special training or experience in the science of petroleum as would qualify him to testify on such a comprehensive and complicated matter as that embraced in and by said objectionable question aforementioned.

Again we cannot help but note the very different attitude of the court in giving, on the one hand, this so-called expert the widest latitude and free rein in hypothetically expressing his opinions (guesses) on the very issues in this case and as to which he had made no scientific tests whatsoever; and, on the other hand, refusing Dr. Von Hoover, a fully qualified scientist, to even begin to relate the *facts* observed by him in his careful and exhaustive scientific tests, let alone express his opinions based thereon.

(E) The Unfair Attitude of the Trial Court Towards Appellants.

We approach this section of our brief with a most profound respect for Judge Roche, the trial judge. Perhaps it might come as a shock to so much as suggest that Judge Roche, of all judges, could be found wanting in seeing that these appellants received anything but the fullest and fairest consideration in his courtroom. We regret to say, however, that it is our sincere conviction, as officers of this court, that he did not.

That something which may best be characterized as the undefinable impressions of the trial persuade us who write this brief that the trial judge manifested a deep rooted opposition (unconsciously perhaps) to anything sold to a person suffering or afflicted with disease that had not been prescribed by a physician; and that this deep seated feeling translated itself into an obvious antipathy towards appellants which must have become manifest to the jury.

We have shown hereinabove that the trial court permitted the Government great latitude in presenting its so-called "expert" testimony. It permitted the Government's doctors to express opinions as to the efficacy of these Colusa products without the slightest showing that they had used them or tried them in any way. Likewise,

it permitted the Government to indulge in lengthy cross-examinations on wholly irrelevant matters. (See p. 70, infra.)

One would naturally expect that the court would permit similar latitude in the presentation of the defense case, particularly where, as here, no charge of fraud or bad faith was involved. One would all the more expect this in view of the fact that the Government's own witnesses admitted that the medical profession knows no cure for psoriasis, and various other of these skin diseases. Under these circumstances, one would expect that the court would be only too ready and anxious to permit the introduction of any and all evidence which the defense could produce bearing upon the efficacy of these Colusa products in the treatment of these horrible skin diseases.

Yet, we find the opposite. Not only did the court erroneously and unduly restrict the defense proof (as shown in previous portions of this brief), but the court likewise made it very manifest to the jury, during the presentation of the defense case, that the court wanted to get through with our side of the case. For example, when Dr. Vincent, the able and elderly Texas physician (p. 20, supra), was testifying as a defense witness, the court stated, "Proceed. Let's get through with this case." (Tr. 99.) We had hardly completed our qualification of Dr. Von Hoover as an expert pharmacologist when the court stated, in ruling on an objection, "Let us get through with this witness." (Tr. 122.) A few minutes later, the court stated, with respect to the same witness, "I will allow him to answer with the hope we will get through soon." (Tr. 123.) A little later, in the course of the testimony of this vital defense witness, "The Court: I am going to try to get through with this witness." (Tr. 129.)

Mr. Colgrove, one of the defendants, had hardly been seated in the witness chair when the Court, in interrupting a short preliminary statement by the witness as to how he became interested in this oil project, stated quite sharply, "We are not concerned here with what you are interested

in." (Tr. 161.) A few minutes later, "The Court: Let's get through with this witness." (Tr. 165.)

Yet we find, on the other hand, that the court permitted the Government, over the strenuous and repeated objection of the defense, to cross-examine this same witness on many wholly and palpably irrelevant matters which have not the slightest bearing on the issues in this case. (See p. 70, infra.)

Other similar incidents could be multiplied to show the attitude manifested by the trial court towards the defense case. We will cite but one more. Mr. A. W. Scott, a welder, testifying as a defense witness, was telling about the efficacy of Colusa Oil in treating severe burns. An objection was made by the Government to a certain question propounded to him early in his examination, and the court, instead of ruling, stated, "Is that all from this witness?" (Tr. 159.)

In our sincere and humble opinion, the foregoing and other similar remarks made by the trial court during the presentation of the defense case, clearly and definitely conveyed to the jury the idea that the court considered our case to be deserving of little consideration. Such remarks, for all practical purposes, had the effect of largely destroying the value of these witnesses to the defense.

The Federal appellate courts have on many occasions pointed out the tremendously important part which the remarks of a trial judge may have upon a jury. As the Supreme Court (speaking through Justice Hughes) stated in *Quercia v. U. S.*:

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling'. This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided.'" (289 U. S. 466, at 470.)

The Circuit Court of Appeals for the Seventh Circuit well explained the true function of a trial judge in the following language:

> "While he has the right to ask questions of witnesses in order to ascertain the facts and elicit the truth as to points in issue, he must not forget the functions of the judge and assume that of the advocate, lest he give the jury the impression that he favors one side or the other, and the extent to which he participates in the examination of a witness must depend largely upon the circumstances of the particular case and the conditions which arise during the trial. *He should also be ever mindful that one of the most important essentials to the performance of the exalted task of upholding the majesty of the law is dignity and decorum.*" (*U. S. v. Lee* (C.C.A. 7), 107 Fed. (2d) 522, at 529.) (Italics supplied.)

Certainly, we respectfully submit, the kinetical and abrupt attitude manifested by the trial court in this case towards appellants, whose business has been that of bringing relief and comfort to thousands of people suffering from these horrible skin afflictions, was not conducive to the fair trial to which these appellants were entitled.

(F) The Court Erred in Permitting the Government to Cross-examine Defendants at Length on Wholly Immaterial Matters.

Pertinent Assignment of Error: This point is predicated upon Assignment No. XXV (Tr. 361; Appendix p. xviii) and Assignment No. XXVI. (Tr. 361; Appendix p. xviii.) These assignments assert that the court erred in permitting the Government to pursue an extended cross-examination of the defendant Colgrove on matters wholly irrelevant to the issues involved in this case.

Argument: While the Government contended, on the one hand, that the bad faith (or good faith) of the defendants was not in issue (and thereby blocked much of the defense proof), the Government sought (and received) a wide latitude when it came to the conduct of its cross-

examination. For example, the court, over repeated objections of the defense, permitted the Goverment to go into a lengthy examination as to Mr. Colgrove's past business activities (Tr. 254; Assignment No. XXV, Appendix p. xviii), *matters which had absolutely no bearing whatsoever upon the issues in this case,* if the issues were as defined by Government's counsel in his earlier objections to defense evidence.

> "Q. In 1930, did you continue the operation of the insurance business in the State of Illinois?
>
> "Mr. Gleason. We object to that on the ground that it is incompetent, irrelevant and immaterial, and has nothing to do with the issues in this case.
>
> "The Court. Objection overruled.
>
> "Mr. Gleason. May we have an exception?
>
> "The Court. Note an exception.
>
> "A. Yes, sir.
>
> "It was here stipulated that defendants' objections would run to this line of questioning with exceptions reserved." (Tr. 253.)

Another example of this is the lengthy examination of Mr. Colgrove concerning a wholly immaterial matter, the so-called Dr. Woodman testimonial letter. (Tr. 254-256; Assignment No. XXVI, Appendix p. xviii.) In overruling the defense objection on this phase, the court in effect told the jury they could consider this wholly immaterial matter, while at the same time the court would permit the jury to receive nothing which tended to prove the good faith of the defendants, viz.:

> "Mr. Gleason. We object to that on the ground that it is utterly incompetent, irrelevant and immaterial. What bearing has that on this case?
>
> "The Court. That is a matter entirely for the jury. Let the jury determine." (Tr. 255.)

The purpose of the Government in connection with this Woodman letter was and is, of course, quite obvious. By this wholly inconsequential matter, the Government's counsel sought to lead the jury to believe that Mr. Colgrove had acted in bad faith in connection with said

letter. And yet the Government had, a short time previously, in the direct examination of this very witness, emphatically and successfully contended that the element of good faith or bad faith was not at all involved.

(G) The Court Erred in Refusing to Permit Appellants to Prove Various Facts to Show Their Good Faith.

Pertinent Assignment of Error: This point is predicated upon Assignment No. XXVII. (Tr. 363; Appendix p. xix.) This assignment contends that the court erred in preventing defendants from showing that in distributing their products to the public, they did so in an ethical and honest manner.

Argument: The defendants sought to prove that they, in conducting their business of distributing these products of skin sufferers, conducted it on an honest and ethical basis, and tried in every way to be fair and just to the public. As evidence of their good faith, they sought to show various things. For example, they sought to prove that in distributing these products they at times used a "gratitude price offer", that is, they offered to, and did, mail these products to skin sufferers on a basis whereby these people paid nothing for the products unless and until they had first used them, after which they paid according to their "gratitude". In other words, if they did not desire to pay, they did not have to do so. The court refused to permit proof of this practice. (Tr. 162.)

Likewise, defendants sought to show that they made a practice of distributing the oil free of charge to hospitals and to doctors, and also to any person who wanted to use it, if such person was not in a position to pay for it. The court likewise refused to permit any such proof. (Tr. 167.) The Government repeatedly and successfully objected to proof of any such facts, by contending that the good faith of the defendants was not at all involved in the case.

This case is, of course, a criminal proceeding. We submit that it should be, and is, the right of every defendant charged with misrepresentation to the public to prove any

and all facts showing or tending to show that in dealing with the public, and in doing the things which are impugned by the Government, they acted in good faith. The jury should be entitled to consider any and all such facts in order to arrive at its conclusion as to whether in truth and in fact the defendants did misrepresent to the public in their dealings with the public.

(H) The Court Erred in Refusing to Permit Mr. Everett, a Defense Witness, to Testify as to the Physical Condition of Another Person Who Had Used These Colusa Products.

Pertinent Assignment of Error: This point is based on Assignment No. XXXII (Tr. 369; Appendix p. xx), which asserts that the court erred in refusing to permit a defense witness to testify as to the physical condition of another person who used these Colusa products.

Argument: Mr. Everett, a defense witness (Tr. 93-96), after relating his successful use of the Colusa Hemorrhoid Ointment in treating his own case of hemorrhoids, was then interrogated concerning another person, a friend, who had used these Colusa products. We first sought to bring out the fact that this person was ill, viz.:

> "The Witness. A. Why, he was ill.
>
> "Mr. Zirpoli. Your Honor, that very statement is a conclusion; that he was ill calls for a conclusion; that is not a physical decription. I ask that that be stricken from the record.
>
> "The Court. It may go out.
>
> "The Witness. He was thin, depressed.
>
> "Mr. Zirpoli. I ask that the conclusion that he was depressed go out; that obviously is not a conclusion that a person can make.
>
> "The Court. It may go out." (Tr. 95.)

Another example of this occurred in the testimony of Mr. Colgrove in connection with his testimony as to the case of Baumgartner, the so-called "hands" case referred to in appellants' advertising matter.

> "Mr. Gleason. Q. Did he appear at that time to be in the same mental condition as he appeared on the first occasion when you met him?

"Mr. Zirpoli. I object to that as calling for the conclusion of this witness as to whether he was in the same mental condition.

"The Court. The objection will be sustained. Let it go out and let the jury disregard it. He may state what he observed.

"Mr. Gleason. If the court please, may I, with the permission of the court, call attention to a settled rule of law to the effect—I have the authorities and the books here—that any lay witness may give an opinion as to mental condition, as to anguish, torment, joy, happiness.

"The Court. He may state what he observed. Let the jury determine it.

"Mr. Gleason. I would like to ask the witness for his opinion, if the Court please, under the well settled rule of law which I have.

"Mr. Zirpoli. I object to that if it calls for a conclusion." (Tr. 163-164.)

The law as to such conclusions: It is a well settled rule of evidence that a witness has the right to give his *conclusions* as to the appearance (mental or physical) of another person, viz.:

"Thus a witness may be allowed to state that a person appeared to be, or impressed him as being, affectionate; that one was afraid, frightened, or scared; that a person was agitated, confused, excited, incoherent, nervous or surprised; or on the other hand, calm, quiet, or rational; that a person was angry, cross, enraged, or mad; that one was anxious, *apprehensive,* distressed or *worried;* that one was bitter; that one was contented, or pleased; or on the other hand, disgusted, or hurt; that a person was despondent, or the reverse; that one was feeling pretty bad, that one was friendly, or hostile; that one was interested, or indifferent; that one was jesting or in earnest; or that a person was joyous, or sad. A witness has also been permitted to characterize a state of mind as natural, or as related in a particular way to that of another person; and to state that a person appeared to be listening; that he *exhibited such emotions as anguish,* attachment, ferocity, or *grief,* or that he exhibited no sorrow. Statements

have been received that one's bearing was truculent, overbearing, or insolent; or that he had a sneer on his face; that one's disposition was bright and cheerful; that one impressed the witness as happy and contented; and that one was in his usual frame of mind. A witness has also been allowed to state the existence of more complicated mental states, as belief, intention, knowledge, or the operation of undue or other influence. A change in habitual mental attitude may also be stated." (22 *Corpus Juris,* pp. 614-616, and the host of cases therein cited.) (Italics ours.)

"* * * an ordinary observer who has had suitable opportunity for observation may state the apparent physical condition of another person, or testify as to what are more distinctly inferences from animate bodily phenomena, as the existence of a state of apparent health, or, on the other hand, the existence of a state of apparent sickness or disease, as that a person had fever, or was ruptured, or paralyzed. Such an observer may also state a change in apparent condition, whether the change is from sickness to health, or from health to sickness, or from bad to worse, or from worse to better." (22 *Corpus Juris,* p. 618, § 711, and the many cases cited therein.)

One of the host of cases illustrating said rule of law giving lay witnesses the right to express their opinions or conclusions as to the mental or physical condition or suffering of another is *Kimball v. Northern Electric Co.,* 159 Cal. 225, at 231, viz.:

"The admission of testimony of respondent's nurse upon the extent of his suffering was not erroneous. Such testimony is competent and does not require expert qualifications in the person giving it. In *Kline v. Santa Barbara etc. Ry. Co.,* 150 Cal. 750 (90 Pac. 129), the following language was used: 'It does not require an expert to tell whether a person suffers. The appearance of a person who suffers severely is sufficient to manifest his condition to any one of ordinary intelligence and experience. These witnesses had all observed her, had heard her groans and complaints, and were competent to give an opinion as to her suffering.' This so clearly answers appellant's objection that further comment is unnecessary."

It is likewise well settled that such a witness may testify as to whether a person appeared to be in the same mental condition at one time as he did at another, viz.:

> "A witness may state a change in mental condition, whether such change is for the better or for the worse, or may state that there has been no change in mental condition." (22 *Corpus Juris,* p. 604, § 697, and authorities cited.)

(I) The Court Erred in Refusing to Permit Appellants to Prove Certain Facts to Show that the Public Was Not Misled by Appellants' Advertising Matter, Attacked by the Government as False and Misleading.

Pertinent Assignment of Error: This point is based upon Assignment No. XXIII (Tr. 358; Appendix p. xxi), which contends that the court erred in preventing defendants from proving certain facts as to their dealings with the public in the sale and distribution of these Colusa products, to show that the public was not misled.

Argument: As shown hereinabove, the information charges that appellants' advertising matter was *false and misleading.* This, of course, meant false and misleading *to the public.*

To refute this charge, appellants sought (in addition to showing, by the aforementioned concrete and undisputed "case" evidence from actual users, that these Colusa products were efficacious in the treatment of these skin diseases) to also show that in truth and in fact the public had not been misled or duped, but, to the contrary, had been treated in a fair and honest manner. To demonstrate this, appellants sought to prove various facts which may be briefly summed up as follows: That in the course of this business, during the past three years, many thousands of persons have purchased these Colusa products; that all such sales were made under a rigid money-back guarantee completely protecting the purchaser in the event that these products did not live up to the description thereof contained in the advertising matter; that of these many thousands of purchasers, *less than two per cent* availed

themselves of this unconditional guarantee; that many hundreds of these people, instead of asserting or claiming that they had been misled, sat down and voluntarily (and wholly without any solicitation from appellants) sent to this company testimonials praising these Colusa products, and stating how completely they were satisfied therewith.

The court repeatedly prevented any such proof. The following excerpt, set forth in the above mentioned assignment, indicates how completely and quickly the court disposed of this line of proof:

> "Mr. Gleason. Q. Mr. Colgrove, in the course of your marketing of this product, can you tell us the number of sales that have been made of this product to people throughout the United States?
>
> "A. Many thousands of them.
>
> "Q. You sold your product on a money-back guarantee, did you not?
>
> "A. Yes.
>
> "Q. Can you tell us how many of the people to whom you sold this product throughout the United States availed themselves of the opportunity to receive their money back?
>
> "Mr. Zirpoli. I object to that as irrelevant and immaterial, and a form of negative proof. I object to it.
>
> "The Court. The objection will be sustained. We are not here concerned with any money-back guarantees. There is no issue involved in this case about money or money back for any sales. Let us proceed." (Tr. 177-178.)

Finally, defense counsel made a lengthy offer of proof summarizing the various facts which they sought to prove (Tr. 178-180) and which are briefly summarized above. The court sustained the Government's objection to this offer, as it had previously done in connection with the defense effort to introduce evidence covering these various facts.

Proof of all of said facts was, we respectfully submit, proper and should have been permitted, because all of said

facts, when taken together, would have refuted or tended to refute any claim or contention that the advertising matter of appellants was misleading to the public. What better proof could there be on the issue as to whether or not the public had, in fact, been misled by appellants' advertising, than the public's own reaction thereto!

Certainly, we respectfully submit, these facts above recited would, under simple principles of logic, bear upon said fundamental issue as to whether or not the public was misled. In the last analysis, the test of relevancy in our modern jurisprudence is, of course, logic.

> "Logic is the controlling force in the modern law of evidence * * * It is therefore a basic rule of evidence that whatever facts are logically relevant are legally admissible, while facts which are not logically relevant to the issue are not admissible; the onus of showing the relevancy, intrinsic or in connection with other facts, of a fact offered in evidence being upon the party offering the evidence." (22 *Corpus Juris,* p. 158, § 89.)

The Supreme Court of the United States enunciated this fundamental in *Standard Oil Co. v. Van Etten,* 107 U. S. 325, viz.:

> "Whatever naturally and logically tends to establish it (i.e., the fact in question), is competent evidence." (At p. 332.)

Incidentally, the Government's objection that this evidence was inadmissible because it was a "form of negative proof" was, we respectfully submit, without merit. It is well settled that "negative evidence" is competent and proper. (22 *Corpus Juris,* p. 168, § 94, and the many authorities therein cited.)

The following are a few of the many cases in which courts, under a variety of circumstances, have approved the use of "negative evidence or proof", viz.:

Steil v. Holland (C.C.A. 9), 3 Fed. (2d) 776;

Norfolk Southern R. Co. v. Stricklin (D.C.-N.C.), 264 Fed. 546;

Fels v. East St. Louis & S. Ry. Co. (C.C.A. 8), 275 Fed. 881;

Ill. Central Co. v. Sigler (C.C.A. 6), 122 Fed. (2d) 279;

Wheeler v. Fidelity & Casualty Co., 298 Mo. 619, 251 S. W. 924;

Exposita v. United Railroads, 42 Cal. App. 320, 183 Pac. 576;

Thuet v. Southern Pacific Co., 135 Cal. App. 527;

Nall v. Brennan (Mo.), 23 S. W. (2d) 1053.

In *Steil v. Holland,* supra, this Honorable Court (Hunt, J.) stated the following with respect to certain "negative evidence" similar in purpose to that sought to be introduced by us (i.e., to show absence of complaints, etc.):

> "However, the question of practice need not be dwelt upon, because there was direct testimony by plaintiffs below to the effect that they had sold goods of the same 'range' to other tailors in San Francisco *and had received no complaints* * * *" (Italics ours.)

The court in *Nall v. Brennan,* supra, tersely expressed itself:

> "A negative fact may be proved by negative evidence." (Citing authorities.)

In *Wheeler v. Fidelity & Casualty Co.,* supra, the court similarly stated:

> "These questions called for testimony that was clearly relevant, and if they had elicited negative evidence, as it was assumed they would do, such evidence would not have been inadmissible merely because negative in character."

VI. THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY IN THIS CAUSE.

(A) Instructions as to Issues Involved in This Case.

(1) Instructions.

Over objection of the defense, the court gave the following instructions to the jury as to the scope of the issues in this case:

> "The sole and remaining question for you to determine from the evidence in this case is whether or not the drugs covered by the three counts of the information were misbranded as alleged by the Government. If you are satisfied from the evidence beyond a reasonable doubt that the articles of drug bore statements in their labeling or accompanying circulars or newspaper mat that were false or misleading *in any particular in which they are alleged in the information to be false or misleading,* then the drugs in those counts wherein the labeling is so false or misleading in any particular is misbranded in the manner charged by the Government and your verdict shall be guilty as to those counts wherein such misbranding exists. If you find from the evidence that the statements in the labeling of the drugs covered by the respective counts of the information support the therapeutic claims of the defendants and are true, then the drugs covered by those counts wherein the statements of the labeling as to therapeutic claims are true, are not misbranded, your verdict should be not guilty for all or any of those counts wherein you so find." (Tr. 335-336.)

This particular instruction is covered by Assignment No. VII (Assignment of Errors, Tr. 335; Appendix p. xxii) and was duly excepted to.

Another instruction was given to substantially the same effect:

> "It is not necessary for the Government to prove that each and all of the statements of each count of the information contained on the label or in the circulars or newspaper mat are false, or misleading. If the Government has established by the degree of evidence which I have explained to you, *that any one*

material statement or representation as to the therapeutic effect of the drug upon the label or circular or newspaper mat covered by any one count is false or misleading, then the article covered by that count is misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act, and you should find the defendants guilty as to such counts in which you find the article so misbranded. But if the Government has failed to establish to your satisfaction by that degree of proof and beyond a reasonable doubt any one of the charges of misbranding in any one or more of the counts, then you should acquit the defendants as to such counts."

This instruction was duly excepted to, and is covered by Assignment No. VIII. (Assignment of Errors, Tr. 336; Appendix p. xxiii.)

The court gave two other instructions to substantially the same effect. (Assignment of Errors Nos. X and XI, Tr. 338-339; see Appendix pp. xxiv, xxv.)

(2) These instructions were far too broad, and were confusing and misleading to the jury.

As shown above, the information in this case is rather a confusing affair. It first sets forth, by way of quotations, a large number of statements quoted from appellants' advertising matter. These statements, if individually listed, would aggregate a large number of individual items of assertion.

The information then proceeds to allege that "the statements aforesaid" were *false and misleading.* Added to this particular allegation, however, is the all important limitation that these statements were false and misleading because they represented and suggested that this Colusa Oil would be efficacious in the treatment of certain skin diseases, and would accomplish certain other things specifically set forth in the information (as listed at p. 10, supra).

In short, the true and only issues involved in this first count (likewise the second) were those raised and framed

by that portion of the information mentioned in the foregoing paragraph, that is, the portion charging that appellants in effect represented that this drug would be efficacious in treating these skin diseases, etc. Stating the matter a little differently, if appellants disproved this portion of the information (or if the Government failed to prove this portion of its charge) the defendants would be entitled to an acquittal with respect to such count, *irrespective of what the Government proved with respect to the first portion of its information wherein it quotes the various allegedly false statements taken from the advertising matter of appellants.*

For example, a statement is made in the advertising matter (and quoted in the information) that Colusa Oil carries four per cent iodine and has "radium emanations". Let us assume, simply for the sake of argument, that the Government had proved these particular statements to be false. Let us further assume that the proof showed (as it clearly does) that this Colusa Oil was and is very effective in the treatment of psoriasis and these other skin diseases. Certainly under this state of proof, and under the true issues as framed by this information, a conviction would not be justified. To the contrary, an acquittal would be in order.

However, the aforementioned instructions of the court advised the jury, in effect, that if *any* statement in the advertising matter was proved to be false, as charged in the information, the jury should convict. We contend that such an instruction must necessarily have misled the jury into believing that if the Government proved *any* statement in this advertising matter to be false, that was sufficient.

And it should be noted, that these particular instructions were very prejudicial in this case, because of the nature of the proof put on in the Government's case. As shown by the review of evidence hereinabove set forth, the Government devoted most of its proof to attempts to disprove various inconsequential and technical statements in

appellants' advertising matter. For example, it brought a witness all the way from Washington, D. C., to give a lecture on the rather mystical subject of radium and on radium emanations. It put on chemists who, after a most cursory and brief examination of this oil, including a smell or two, testified that the oil did not contain some of the constituents attributed to it in appellants' advertising matter. But when it came to the true and only issue, the efficacy of this oil in the treatment of psoriasis, etc., it put on no proof whatsover of *facts* covering this vital issue.

As stated above, the defense, instead of devoting its limited trial time to tilting with such windmills, undertook to prove the efficacy of this Colusa Oil by putting on *concrete factual evidence,* in the shape of living testimonials whose skin had been freed by this Colusa Oil of horrible skin afflictions.

Under this state of the Government's case, and because of the aforementioned instructions of the court, the jury was, in our opinion, led to believe that notwithstanding this clear-cut evidence of the defense, they were to convict the defendants if *any* of the statements in the advertising matter were proved to be false.

For these reasons, therefore, we respectfully submit that the aforementioned instructions of the court were erroneous and prejudicial.

(B) Instruction as to Intent.

(1) Instructions.

The court gave the following instruction to which appellants duly excepted:

> "The Federal Food, Drug and Cosmetic Act does not make the intent with which an unlawful shipment is made, an ingredient in the offense. *The intent of the defendants is immaterial.*" (Italics ours.)

This instruction is covered by Assignment No. IX. (Assignment of Errors No. IX, Tr. 337, Appendix p. xxv.)

The court also instructed the jury:

> "Therefore, if you find from the evidence beyond a reasonable doubt that the drugs involved in the three counts of the indictment, or any of them, were in fact misbranded in the manner alleged in the information or any count thereof, you shall find the defendants guilty as charged in those counts wherein you find the drugs were misbranded, *regardless of the intent in the minds of the defendants.*" (Italics ours.)

This instruction is covered by Assignment No. X (Assignment of Errors, Tr. 378; Appendix p. xxiv), and was duly excepted to.

The court refused to give the following instruction duly requested by appellants:

> "To constitute a party guilty of crime, the evidence must show intentional participation in the attempt to violate the statute in question."

This is covered by Assignment No. XII. (Assignment of Errors, Tr. 339; Appendix p. xxvi.) It also refused to give a similar instruction requested by the defense. (Assignment No. XIII, Tr. 340; Appendix p. xxvi.)

The court also refused to give the following instruction requested by appellant Colgrove, viz.:

> "In this case Mr. Colgrove is jointly charged with the defendant corporation in the information. However, you are instructed that it is the law that an officer of a corporation—and here Mr. Colgrove is President of the corporation—cannot be held liable unless he personally knowingly and actually participates in the commission of the acts alleged to be unlawful. An officer of a corporation is not criminally liable for the acts of the corporation performed by other officers or agents. Therefore, unless you find that Mr. Colgrove did not know that the jars of ointment referred to in the third count of the information had not been properly labeled, but that the jars of ointment with the incomplete label had been shipped by clerks and employees of the corporation without Mr. Colgrove's knowledge, then and in that event you will find Mr. Colgrove personally not guilty."

This is covered by Assignment No. XIV. (Assignment of Errors, Tr. 340; Appendix p. xxvii.)

(2) Erroneous nature of said rulings.

In an earlier portion of this brief (p. 59, supra), we briefly argued the error of the trial court in excluding certain evidence designed to show that the omission of the designation of quantity from the labels on the jars of ointment (the subject matter of the second phase of the third count) was entirely inadvertent, and that this inadvertence was immediately corrected, at substantial expense, when discovered.

The aforementioned rulings and instructions of the court were erroneous for the same reasons that the court's rejection of said proffered evidence reviewed in said earlier portion of this brief (p. 59, supra) is claimed to be erroneous. We will not repeat our earlier argument here, but respectfully request that this Honorable Court consider it as also applicable to this phase of our brief.

In short, intent is, we respectfully submit, always a vital element of a crime. Certainly, a citizen should not be convicted of a crime if his alleged omission is due to the mistake or inadvertence of another, for which he is not responsible. The aforementioned instructions of the court, in effect, advised the jury that the appellants were guilty of a crime in connection with this omission from the labels, even though such omission was entirely inadvertent, and the fault of the printer and not that of appellants. For the reasons argued at greater length earlier in this brief, such instructions were, we respectfully submit, erroneous.

Insofar as Assignment of Error No. XIV, dealing with the responsibility of the defendant Colgrove as a corporate officer, the law is well settled that before such an officer can be held responsible for the omission of the corporation, he must be shown to have been responsible

for, or have participated in, the action branded as a crime, viz.:

Fletcher on Corporations, Vol. 4, page 3966, on the subject of criminal liability of corporate officers, says:

> "The officer is generally held not liable unless he participates in the unlawful act either directly or as an aider, abetter or accessory, and this is so even though the offense is the violation of a statute which imposes imprisonment as a penalty. A corporate officer, without regard to his position, is ordinarily not criminally liable for corporate acts performed by other officers or agents of the corporation."

Appellant Colgrove testified positively that he knew nothing about this omission, and that he had nothing to do with the shipment involved in the third count, viz.:

> "Mr. Gleason. Q. Mr. Colgrove, did you personally have anything to do with the mailing or sending or dispatching of this ointment to Snapp's Drugstore in New Mexico? A. No sir.
>
> "Mr. Zirpoli. To which I object as irrelevant and immaterial.
>
> "The Court. Let the question and answer stand. Proceed.
>
> "Mr. Gleason. Did you know or have any knowledge that this ointment was being shipped to the Snapp's Drugstore in New Mexico, I believe it is, with the particular labels on those bottles that were in fact on them?
>
> "A. I did not know that the labels did not contain the three-quarters of an ounce contents." (Tr. 175.)

Therefore, the court also erred, we respectfully submit, in refusing to give the instruction requested by defendant Colgrove, as covered by Assignment No. XIV.

CONCLUSION.

From what has been written in the foregoing pages, it is respectfully submitted that the judgment appealed from should be reversed. The evidence is insufficient to sustain this conviction. Furthermore, and apart from the sufficiency of the evidence, the various prejudicial errors committed by the trial court require, we respectfully submit, a reversal of the judgment.

After all else has been said about this case, one thing stands out uncontradicted and unimpeached—and that is that this Colusa Natural Oil has brought to many hopeless and helpless sufferers that surcease from their afflictions which theretofore had been denied them. We know not why this oil brings such relief. Even so outstanding a doctor as Dr. Woodman does not know, for he said (Tr. 81): "I don't know why it cures; it is just one of those things." The secret of this healing oil is buried in the recesses of the earth from which it is taken.

The factual testimony of Crawford, Fazio and Stabeck, of Mrs. Mead, Mrs. Loughran and Mrs. Harless, of Everett, Sablich and Scott, of Miss Davis, Mrs. Cameron and Mrs. Welch should be accepted *as a matter of law* in preference to the hypothetical testimony of experts, not one of whom had ever clinically tested or even used the oil. The testimony of Doctors Woodman and Vincent, who have used this oil successfully in hundreds of cases, should be preferred *as a matter of law* to that of doctors who never have used it and know nothing about it.

In conclusion, we are reminded of an event that took place many years ago. A man had been born blind. When grown to young manhood, he sat by the wayside in his helplessness and begged of those who passed by. One came by and saw him and his heart was touched and, calling the blind man to him, healed him and restored to him his sight. Now it might be imagined that great rejoicing would have followed for it had not been heard "that any man had opened the eyes of one that had been born blind." But the incident was not permitted to go

by unchallenged. The leaders of the village called the young man's parents and demanded to know of them if this was their son and if he had been born blind. And they were frightened and told them the man was their son and was born blind but as he was of age to ask him any further questions. Then they again asked the young man of his healing and added that the one to whom he attributed his sight was a sinner. Then came forth the answer which is still treasured though nineteen hundred years have passed: "Whether he be a sinner or no, I know not; one thing I know, that, whereas I was blind, now I see." (John 9:25.)

We know not why this natural oil has brought to those afflicted souls surcease from the itching and discomfort and pain of psoriasis and the other skin diseases which make "the whole head sick and the whole heart faint". But with all the earnestness we command, and with sincerity as deep as the wells from which this oil is extracted, and for the sake of those who still suffer and are told for them there is no cure, we submit this judgment should be reversed and its stigma removed from those whose conviction was brought about by the errors set forth in this brief.

Dated, San Francisco,
April 1, 1943.

Respectfully submitted,
WALTER M. GLEASON,
WILLIAM B. ACTON,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

ASSIGNMENT No. XV. (Tr. 341.)

The Court erred in sustaining an objection of the Government to questions of defense counsel to the witness Dr. Von Hoover, which questions were designed to elicit the opinion of the witness as to the efficacy of Colusa Natural Oil in the treatment of certain skin diseases. This witness was, as shown in the record, a duly qualified pharmacologist whose business was that of testing preparations and drugs for their therapeutic efficacy; the evidence shows that he was thoroughly trained in his profession, holding degrees from leading universities, including the University of Vienna; that he had practiced this profession for a long period of time, and in this practice had represented, and now represents, leading drug firms of this country as a consultant pharmacologist; that he and some professional associates operate a testing clinic at San Antonio, Texas, and that the function and business of this clinic is that of testing just such preparations as those involved in this case to determine their therapeutic value; that this witness and his said associates had conducted extensive clinical tests of Colusa Natural Oil; that in those tests, they actually tested the oil on many human beings suffering from the various ailments mentioned in the information in this case, including the disease of psoriasis, to determine whether or not this product is efficacious in the treatment of such ailments. After bringing out all of said facts aforementioned, the defendants sought to elicit the opinion of this witness as to the efficacy of this product. The Government objected to such testimony on the ground that because the witness was not actually an M.D., he was not competent to give any such opinion. The Court agreed with counsel for the Government and sustained their objections to this line of examination. The record with respect to this in part is as follows:

"Mr. Gleason. Q. What is your opinion, Doctor, based upon the many tests made by you in your laboratory and in these clinics, and based upon your training as a pharmacologist, and based on your studies of the science of pharmacology, what is your opinion as to the efficacy of Colusa Oil in the treatment of psoriasis?

"Mr. Zirpoli. I want to interpose an objection, your Honor.

"The Court. Objection sustained. Proceed.

"Mr. Gleason. Note an exception, if your Honor please.

"The Court. Let an exception be noted."

Said ruling was erroneous in that said evidence was and is clearly competent and material. This witness, a duly qualified specialist in this field of testing drugs had actually made detailed clinical tests to determine the efficacy of this product in the treatment of psoriasis, and the mere fact that he was not an M.D. certainly did not preclude him from testifying on this subject.

ASSIGNMENT No. XVI. (Tr. 343.)

The erroneous and prejudicial effect of the Court's rulings on this phase is further exemplified by the following portions of the record:

"Yes, I observed the use of Colusa Natural Oil on a man named Merculin, who met a premature death. He was a deputy sheriff.

"Q. What skin disease did he have, Doctor?

"Mr. Zirpoli. I object to that on the ground that this witness is not qualified to testify to that.

"The Court. Objection sustained.

"Mr. Gleason. Q. Do you know what disease he had?

"Mr. Zirpoli. The same objection.

"The Court. The same ruling.

"Mr. Gleason. Q. He had a skin disease, did he, Doctor?

"A. He did.

"Q. On what part of his body?

"A. On the right arm.

"Mr. Zirpoli. I ask that the answer go out. He is not competent to testify.

"Mr. Doyle. We will take a ruling of the Court.

"The Court. Proceed."

"Q. After the oil was applied in the clinic, did you observe its effect upon the patient?

"A. Yes.

"Mr. Zirpoli. I object to his observation of the effect of a medication on a patient. He is not competent to testify to the effect of a medication on a patient.

"Mr. Acton. I don't like to argue after your Honor has ruled, but the law is, I think, your Honor, that a man may observe a person, and may know that person is undergoing a certain type of medication, because he is undergoing it right in his own home, or in his laboratory.

"Mr. Gleason. Q. Did you see the Colusa Natural Oil applied to people who had psoriasis in this clinic?

"A. Yes.

"Mr. Zirpoli. Just a moment, I object to that. He is not competent to testify they had psoriasis.

"The Court. Objection sustained.

"Mr. Zirpoli. There are methods of proving those things by bringing proper witnesses."

ASSIGNMENT No. XVII. (Tr. 344.)

The Court erred in sustaining an objection of the Government and striking certain testimony of the witness Dr. Von Hoover with respect to a varicose ulcer case. This case had been treated with Colusa Natural Oil in this clinical testing of Dr. Von Hoover and his associates. This testimony was as follows:

"A. Mrs. A. Nelly is the varicose ulcer.

"The Court. How do you know?

"A. Well, from my experience, your Honor, in the laboratory, and as a doctor of science, and from the knowledge I have of Materia Medica, and dermatology and therapeutics, I determine that.

"The Court. By observation.
"A. By observation, yes sir.
"The Court. That is what you base your testimony on?
"A. That is what I base my testimony on, yes sir.
"The Court. All right, proceed.
"Mr. Gleason. May I have this picture marked next in order for identification?"

Thereupon the photograph was marked Defendants' Exhibit H for identification.

"Mr. Zirpoli. May I ask one other foundational question?
"The Court. You may.
"Mr. Zirpoli. You are not a pathologist, are you?
"A. No, sir, I am not a pathologist.
"Mr. Zirpoli. Now I object to his conclusion as to the woman having a varicose ulcer on that further ground.
"The Court. I still sustain the objection and instruct the jury to disregard the testimony.
"Mr. Gleason. May we have an exception?
"The Court. You may have an exception."

For the same reasons as are set forth hereinabove in Assignment XV with respect to other testimony of this same witness, said ruling of the Court was erroneous, and obviously prejudicial to the defendants.

ASSIGNMENT No. XVIII. (Tr. 346.)

The Court erred in sustaining an objection of the Government to certain testimony of the witness Dr. Von Hoover, with respect to the clinical tests made by him and his associates on animals to determine the efficacy of this Colusa Natural Oil, viz.:

"Q. Please state briefly the facts observed by you in these clinical tests in this animal therapy as to the results of the use of Colusa Natural Oil on skin diseases of animals. And, Doctor, confine yourself to the facts that you know of your own knowledge and do not read any of the opinions if they are opinions of Dr. Burby.

"Mr. Zirpoli. I want to make this objection, your Honor. He is asked to testify as to the effect of the application of this oil, which calls for his opinion and conclusion as a veterinarian.

"The Court. Objection sustained.

"Mr. Acton. Will your Honor allow us an exception to that ruling?

"The Court. Note an exception.

"Mr. Gleason. Q. Doctor, in the practice of your profession as a pharmacologist and your work for these firms that you mentioned yesterday, including the Goodman Laboratories and the rest of them, as their consultant, do you in the practice of your profession resort to animal therapy to test the efficacy of drugs and preparations?

"A. Yes.

"Q. Is that part of the ordinary practice of the ordinary pharmacologist?

"A. That is the practice.

"Q. I will ask you to state, Doctor, the facts that you observed, in your clinical examinations, that is to say, this animal therapy, from the use of Colusa Natural Oil upon the skin diseases of dogs and cats used in this animal therapy.

"Mr. Zirpoli. May it please the Court, I submit that the question is identical in different terms and the objection is made exactly as it was made to the last question.

"The Court. The objection will be sustained.

"Mr. Acton. May we have an exception to the ruling?

"The Court. Note an exception.

"Mr. Zirpoli. May I have the record also show that my objection is on the ground that it is irrelevant and immaterial to the case?

"The Court. Let the record so show."

The evidence sought to be elicited by these questions was clearly relevant and material and the Government's objection that this witness was not qualified to testify as to these facts because he was not a licensed veterinarian was without merit. This witness was a qualified pharmacologist and fully qualified to testify as to this animal therapy which, as the record shows, is an orthodox

procedure in the testing of drugs and other such preparations for the treatment of disease.

ASSIGNMENT No. XIX. (Tr. 348.)

The Court erred in sustaining an objection of the Government to certain questions propounded to the witness Dr. Von Hoover by the defense in their effort to bring out all the facts concerning the clinical testing at San Antonio by this witness and his associates of this Colusa Natural Oil. The witness had in his possession an original memorandum prepared by him in these tests, and he testified that this memorandum was made immediately upon the conclusion of these tests, and that the memorandum refreshed his recollection as to the facts observed by him in the use of this oil upon various persons having the diseases mentioned in the information in this case. The witness further testified:

"Q. What is it?

"A. It is a report of the clinical results of oil on the physiological tests on human patients.

"Q. Those are the one hundred and some-odd patients you mentioned yesterday afternoon?

"A. This contains a hundred, this report.

"This report contains the essential facts which I observed in the making of these tests with Colusa Natural Oil on those one hundred patients.

"Q. Does this report, Doctor, contain a statement of the facts observed by you in these clinical tests made by you and your associates in your presence, on human beings, to ascertain the therapeutic value of Colusa Natural Oil in the treatment of psoriasis, athlete's foot, impetigo, varicose ulcers and hemorrhoids?

"A. Yes.

"Q. And also acne? I omitted acne.

"A. No, I don't believe we tested it on acne.

"Q. You are right, Doctor. You did test for poison oak and ivy?

"A. Yes.

"Q. Now then, will you, by reference to this report——

"Mr. Zirpoli. May I ask some foundational questions before I interpose any objections? This report also purports to be the report of Dr. A. Berchelmann, M.D., clinician, is that correct?

"A. Yes.

"Q. And this report also purports to show the effects and results secured by the treatment of these human persons by the physician and surgeon, is that correct?

"A. Yes.

"Mr. Zirpoli. Then, your Honor, I submit that the witness is incompetent to testify as to the facts herein contained on the grounds that it is not exclusively the information of the witness, and on the further ground that it contains hearsay testimony predicated upon hearsay facts of a physician and surgeon, a person other than himself, and on the further ground that he is not competent as a physician and surgeon to testify as to the effect and results.

"The Court. Same ruling. The objection will be sustained.

"Mr. Acton. May we be allowed an exception to the ruling?

"The Court. Note an exception."

Said ruling was erroneous and highly prejudicial to the defense. It was most important to the defendants that they be permitted to develop all the facts concerning this clinical testing done by Dr. Von Hoover and his associates. The witness made this memorandum when the facts were clear in his mind, and under settled law he had a right to refer to this original memorandum for the purpose of refreshing his recollection as to the exact facts concerning these very important tests.

ASSIGNMENT No. XX. (Tr. 350.)

The Court erred in sustaining an objection of the Government to a certain question propounded to the witness Dr. Von Hoover by the defense, viz.:

"Mr. Gleason. Q. And in the cases personally observed by you in these clinical tests, in any of these cases did you observe any unfavorable or injurious results from the use of Colusa Natural Oil on these patients?

"Mr. Zirpoli. Objected to as calling for an opinion and conclusion, your Honor, of this witness, who is not a physician and surgeon.

"Mr. Gleason. That is his business, if your Honor please, and profession; he tests drugs.

"The Court. The objection will be sustained.

"Mr. Acton. May we note an exception to that ruling?

"The Court. Note an exception."

The fact as to whether or not any injurious or unfavorable results ensued from the use of this Colusa Oil in this clinical testing at San Antonio was, we respectfully submit, a clearly relevant and material fact bearing upon the worth and efficacy of this product.

ASSIGNMENT No. XXII. (Tr. 353.)

The Court erred in sustaining an objection of the Government to certain proposed testimony of the defendant Colgrove. The information charges that certain statements made in the advertising matter issued in connection with this Colusa Natural Oil were false. Among these statements quoted in the information is the statement substantially to the effect that various users of this product have credited it with effective results, etc. In an effort to explain the basis of this particular statement, and to demonstrate the truth thereof, the defense sought to show that the defendants based it in part upon hundreds of voluntary testimonials received from persons who had used this oil in the treatment of the diseases mentioned in the information, viz.:

"Mr. Gleason. Q. In the information, Mr. Colgrove, there is a statement set forth, 'Colusa Natural Oil is credited by other users with producing rela-

tively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete's foot or ringworm, poison ivy, varicose ulcers, burns and cuts.' You have been marketing this oil for approximately two or three years, as I recall your testimony. Upon what did you base this statement that is contained in this information, the statement just read?

"Mr. Zirpoli. I object, your Honor; it is irrelevant and immaterial as to what he based it on; all that matters is the fact that the statement is there and the statement speaks for itself.

"Mr. Gleason. In this information are various statements quoted from the advertising matter. Counsel has submitted to your Honor instructions that we desire to argue to the effect that if any false statement is contained in any portion of the advertising matter, the mats or otherwise, that this man can be convicted. We desire to show the truth of this statement. We desire to show that when Mr. Colgrove said that 'Colusa Natural Oil is credited by other users' he was telling the truth, and we desire to submit to your Honor hundreds of testimonials in regard to this product from users by the defense.

"The Court. Testimonials cannot go into evidence here.

"Mr. Gleason. I don't want you to think I am going contrary to your ruling. I make the statement, I make it as an officer of this court, that I believe under this information, under settled principles of law——

"The Court. You may believe whatever you see fit.

"Mr. Gleason. May I present the law to your Honor on that subject?

"The Court. No, we will proceed. You make your offer of proof and you have a record to protect you, and I will rule.

"Mr. Gleason. Then we will make the offer of proof and that will conclude this subject. We offer to prove the following facts by this witness at this time:

"First, that from persons to whom this preparation was distributed by these defendants throughout the United States, hundreds of testimonials, the originals of which are here available for inspection, and we

have gone to the trouble of copying them—hundreds of testimonials, voluntary testimonials, have been received by this company and by this defendant.

"We further offer to prove that this product was marketed and distributed to these thousands of persons under a money-back guarantee if not satisfied, and that out of the thousands of people to whom that guarantee was made, approximately two per cent availed themselves of the guarantee.

"We further offer to prove, if the Court please, the truth of the statement contained in this information. We offer these testimonials, and these testimonials will prove the truth of the statement that 'Colusa Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete's foot or ringworm, poison ivy, varicose ulcers, burns and cuts,'—the statement contained at lines 13 to 16 on page 3 of this information and reincorporated by reference in later portions of the information. And we offer those facts, if the Court please, as being relevant, pertinent and competent in the proof of the issues involved in this case.

"Mr. Zirpoli. If I might respectfully submit, your Honor, as I have heretofore had occasion to state in arguing various points before the Court, that there was no element of fraud or bad faith involved; it is a simple case of misbranding, and that therefore testimonials are not admissible in evidence. Had this been a fraud case, then the position taken by counsel would have been a proper one, but this is a misbranding case and not a case predicated upon fraud or fraudulent intent.

"The Court. The objection will be sustained.

"Mr. Doyle. Exception if your Honor please.

"The Court. Certainly.

"Mr. Gleason. At this time, if the Court please, simply to complete the record, we desire to have the original testimonials marked for identification.

"Q. To get a preliminary foundation, you have handed me, Mr. Colgrove, a file containing various papers. Did you prepare that file?

"A. No, sir; those letters were written by individuals.

"Q. I mean, did you put these into the file?

"A. Yes, sir.

"Q. What are they?

"A. Voluntary testimonial letters received from purchasers of Colusa Natural Oil products.

"Q. And you personally know that these are voluntary testimonials sent into the office?

"A. Yes, sir."

Thereupon, Mr. Gleason offered these original testimonials in evidence.

"Mr. Zirpoli. Same objection; irrelevant and immaterial.

"The Court. Same ruling.

"Mr. Gleason. May they be marked, then, for identification?

"The Court. Let them be marked for identification."

The proffered testimonials were then marked Defendants' Exhibit Q-1 for identification.

"Mr. Doyle. May we have an exception to the last ruling, your Honor?

"Mr. Gleason. Q. You heard me read, Mr. Colgrove, a statement from the information in this case with respect to other users crediting various and sundry things, a statement contained in some of the advertising matter. Upon what did you base that statement?

"Mr. Zirpoli. Same objection; irrelevant, incompetent and immaterial.

"The Court. Objection sustained.

"Mr. Doyle. I desire an exception, if the Court please."

Said ruling was erroneous because the aforementioned testimonials were admissible and competent and relevant, if for no other purpose than that of explaining the basis for said assertion in the advertising matter, which assertion the Government alleged to be false. The testimonials were also admissible and competent on the issue as to the good faith of the defendants.

ASSIGNMENT No. XXI. (Tr. 351.)

The Court erred in sustaining an objection of the Government to certain testimony of the defendant Colgrove. One of the charges in the Third Count in the information is that the defendants omitted to place on certain labels the designation of the quantity of the contents of the jars in question. The defense sought to show that this omission was entirely inadvertent and was caused by a mistake of the printing firm which printed these labels. The Court ruled that such testimony was irrelevant and immaterial, viz.:

> "Mr. Gleason. Did you eventually discover that such labels were being sent out?
>
> "A. I did, and destroyed the rest of them; I destroyed the balance of those labels and ordered correct labels, a new printing of labels.
>
> "Mr. Zirpoli. May I ask that that all be stricken out as irrelevant and immaterial?
>
> "The Court. The objection will be sustained.
>
> "Mr. Acton. May we note an exception?
>
> "The Court. Note an exception.
>
> "Mr. Gleason. Q. When you ordered the labels printed at the McCoy Label Company, did you in your order ask them to put on the label, the designation '¾ of an ounce'?
>
> "A. I did.
>
> "Mr. Zirpoli. Same objection, your Honor; irrelevant and immaterial as to what he did.
>
> "The Court. Objection sustained."

It was here stipulated that if Miss Nelson, representative of the firm which printed the labels, were called, she would testify this was a mistake on the part of her printing firm; and that in the printing of the labels involved in the Third Count in this case, the designation "¾ of an ounce" was inadvertently omitted from the labels, and that Mr. Colgrove as manager of the defendant company had previously sent said printing firm a letter, marked here as Defendants' Exhibit P for identification, which was received by the McCoy Label Company; and that within a week of this time, Mr. Colgrove had the label

company correct this inadvertence and put upon the label the designation "¾ of an ounce."

"Will that be so stipulated?

"Mr. Zirpoli. Subject to the objections heretofore made that it is irrelevant and immaterial.

"The Court. Objection sustained.

"Mr. Gleason. An exception, if the Court please.

"The Court. Very well."

Mr. Gleason, at this time, to complete that record, offered in evidence Defendants' Exhibit P for identification, which is the letter Mr. Colgrove previously referred to.

"Mr. Zirpoli. We make the same objection. It was offered once before, and I object again that it is irrelevant and immaterial.

"The Court. Objection sustained.

"Mr. Doyle. May we have an exception?

"The Court. Exception."

Said testimony was relevant and material because it showed that the alleged omission from the label was entirely inadvertent and without the knowledge of the defendants.

ASSIGNMENT No. XXIV. (Tr. 359.)

The Court erred in sustaining an objection of the Government to a question asked of the witness Colgrove with respect to the source of certain statements inserted in the advertising matter with respect to the efficacy of radium and radium emanations. The Government claimed that these statements were false, and the defense sought to show that the statements were in fact based upon works and treatises of eminent specialists in the field of radium, viz.:

"Mr. Gleason. Do you have available, Mr. Colgrove, the statement upon the basis of which these statements were incorporated in the newspaper mat with respect to the efficacy of radium through the body? Can you give counsel the authorities from which that was procured?

"A. Yes, sir.

"Mr. Zirpoli. I object to that. Authorities as given by this witness are irrelevant and immaterial.

"Mr. Doyle. May he answer the question, if your Honor please?

"The Court. What question?

"Mr. Doyle. The question as to the source from which he obtained this statement which appears quoted in the mat. It appears as quoted.

"The Court. It matters very little the source of the information or where it came from. We are not concerned with the source of it.

"Mr. Doyle. Exception, if your Honor please."

Defendants had a right to explain the source of any and all statements in the advertising matter which the Government claimed to be false, and the ruling of the Court in this instance was particularly prejudicial because the advertising matter specifically stated that eminent scientists had made the assertions in question about the power of radium. Under these circumstances it was no more than fair and just that the defendants be permitted to give the source and basis of this statement which the Government attacked as false.

ASSIGNMENT No. XXXIV. (Tr. 371.)

The Court erred in sustaining an objection of the Government to a question propounded by the defense to their witness Scott with respect to the following matters. This witness had previously worked for the defendants in the production of this Colusa Oil at the wells in Colusa County. In the advertising matter attacked by the Government as false, is the statement to the effect that the oil was worth $10,000 a barrel. In order to demonstrate the correctness of this statement, the defense sought to show by this witness that in order to get one gallon of this valuable medicinal oil, it was necessary to pump from these wells many thousands of barrels of water, and

that therefore the production process was so costly as to make a barrel of this medicinal oil worth approximately $10,000 a barrel, viz.:

> "Mr. Gleason. Q. You operated these wells in Colusa County for the production of what we term ordinary crude oil. How many barrels of water are pumped in the pumping of these wells, or how many gallons of water in order to get one gallon of this medicinal oil?
>
> "Mr. Zirpoli. We object to that as irrelevant and immaterial as to the process of how this is manufactured.
>
> "The Court. Objection sustained.
>
> "Mr. Gleason. The only purpose, if the Court please, is, if I might just state it: there has been put in evidence a mat with the statement on it, 'Oil worth $10,000 a barrel'. If counsel is going to direct any attention to that, we want to show, if the Court please, that this barrel of Colusa Oil does cost $10,000; that it requires the production of thousands upon thousands of barrels of water.
>
> "The Court. Is that all?"

The evidence sought to be elicited was relevant and material as bearing upon the truth of the aforementioned statement inserted in said advertising matter and attacked by the Government.

ASSIGNMENT No. XXXI. (Tr. 367.)

The Court erred in overruling an objection of the defense to a question propounded to the witness Dr. Tainter by the Government, viz.:

> "Mr. Zirpoli. What is the effect of the application of oil such as the oil here on the skin?
>
> "Mr. Gleason. We object, if the Court please, that no foundation has been laid. We would like to have the doctor state whether or not he ever applied the oil to such a condition. Have you ever applied that oil to a condition of poison oak?
>
> "Mr. Zirpoli. I can cite innumerable cases under the Federal Food and Drug Act, your Honor, which

provide that when a man who is a scientist particularly learned in a particular field takes the stand, he is competent to testify about those matters for which he is specifically trained by reason of his learning and his instruction and his scientific training; and furthermore, there are innumerable cases that say that the particular doctor need not even have applied the particular product involved or have used or seen it if he knows its constituent, component parts and has been given the necessary foundation therefor. And that has been done, because we have told the doctor what this stuff consists of, and the doctor himself has seen it, and from his scientific medical knowledge he can give his opinion as to what the effect would be.

"Mr. Gleason. If the Court please, we doubt very seriously whether counsel can produce any case covering testimony of this type. We would like to ask one question, if we may, for foundational purposes, and that question will be whether or not the doctor has ever applied oil of this type to that kind of a disease.

"The Court. The Court is prepared to rule.

"Mr. Zirpoli. That is cross-examination.

"The Court. The Court is prepared to rule. You may develop that on cross-examination. The objection will be overruled.

"Mr. Acton. Will your Honor allow us an exception?

"The Court. Yes."

The Government had not laid any foundation to show that the witness had applied this particular oil to the skin, and in view of the complex nature of the oils, to permit the witness to testify as to the effect of Colusa Natural Oil on the skin without ever having subjected it to proper tests was incompetent, irrelevant and immaterial.

ASSIGNMENT No. XXVIII. (Tr. 364.)

The Court erred in overruling an objection of the defense to a question propounded to Dr. Tainter, a witness for the Government, viz.:

"Mr. Zirpoli. Q. Doctor, from your examination of this product, was it any different, from your own experience, from ordinary crude petroleum oil?

"Mr. Gleason. Just a moment. If the Court please, we object to that on the ground that it is incompetent, irrelevant and immaterial; that no proper foundation has been laid. And we stress this objection, if the Court please, for the reason, as has already been brought out, there are thousands of different types of crude oils with thousands of different constituents, and for a blanket assertion to be made of this type is utterly unfair. If the Court please, we submit this: if the doctor wants to testify as to the crude oils that he has had experience with, he should give us the formulas and the designations, paraffine, asphalt or otherwise, and then compare this oil with them. Then we have some facts.

"The Court. The Court is prepared to rule. If the witness knows he may answer. The objection may be overruled.

"Mr. Acton. Will your Honor allow us an exception before the answer?

"The Court. Note an exception.

"A. Well, because there are many varieties of oils, the material was different, of course, from a considerable number of them. However, it had no distinctive properties in the sense that it smelled like ichthyol or materials which you would recognize as having medicinal power, so that as far as I could make out, it was the commonest kind of crude oil in the sense that it had no special properties that were distinctive or characteristic."

Said ruling of the Court was erroneous because, as the record shows, there are a great many varieties of crude oils having many different characteristics. The Government sought in this case to impress on the minds of the jury their claim that this was an ordinary crude oil. The question above quoted was designed to carry out this purpose and was prejudicial to the defendants for the reasons stated in the argument above quoted in connection with this question. Said question was wholly incompetent, irrelevant and immaterial.

ASSIGNMENT No. XXV. (Tr. 361.)

The Court erred in permitting the Government to pursue a long line of cross-examination of the defendant Colgrove with respect to his various other business activities, none of which said facts had any relevancy or materiality in the case at bar. The Court permitted this examination over repeated objection of the defense and exceptions were duly taken to such ruling. The following illustrates this line of examination, viz.:

"Q. In 1930, did you continue the operation of the insurance business in the State of Illinois?

"Mr. Gleason. We object to that on the ground that it is incompetent, irrelevant and immaterial, and has nothing to do with the issues in this case.

"The Court. Objection overruled.

"Mr. Gleason. May we have an exception?

"The Court. Note an exception.

"A. Yes, sir."

It was here stipulated that defendants' objections would run to this line of questioning with exceptions reserved.

Said ruling of the Court was erroneous and said line of examination was not proper cross-examination.

ASSIGNMENT No. XXVI. (Tr. 361.)

The Court erred in permitting the Government to cross-examine the defendant Colgrove at length with respect to a certain letter of a Dr. Woodman. Said examination was wholly incompetent, irrelevant and immaterial and was not proper cross-examination, viz.:

"Mr. Gleason. Just a moment, Mr. Colgrove. We object to this on the ground that it is incompetent, irrelevant and immaterial, if the Court please, not proper cross-examination, has no bearing upon the issues in this case.

"Mr. Zirpoli. I would like to submit I am entitled to test the credibility of the witness, your Honor.

"Mr. Gleason. It has nothing to do with the credibility of the witness.

"Mr. Zirpoli. Yes it has.

"The Court. When was this?

"Mr. Zirpoli. The witness took the stand.

"The Court. In 1939?

"Mr. Gleason. This is a letter, if the Court please, dated October 28, 1940. So the Court will know——

"The Court. I will allow it. Objection overruled.

"The letter you show me is a copy of a letter written me by Dr. Woodman, but the original letter did not have 'M. D.' after his signature; my stenographer must have added the 'M. D.' by mistake. When I submitted the letter it evidently had 'M.D.' on it; I knew Dr. Woodman for six months and saw him the day of the hearing; the photostat you show me is a copy of the letter Dr. Woodman gave me and 'M.D.' does not appear on it.

"Mr. Gleason. We object to that on the ground that it is utterly incompetent, irrelevant and immaterial. What bearing has that on this case?

"The Court. That is a matter entirely for the jury. Let the jury determine.

"Mr. Gleason. He testified that his secretary made a mistake.

"Mr. Zirpoli. I will ask that these two exhibits be marked next in order in evidence as one exhibit.

"Mr. Gleason. May we have an exception?"

The documents were admitted and marked Government's Exhibit No. 13.

"Mr. Gleason. May we have an exception, if the Court please?

"The Court. Note an exception."

ASSIGNMENT No. XXVII. (Tr. 363.)

The Court erred in sustaining an objection of the Government to a question propounded by defense counsel to the defendant Colgrove. The defense sought to bring out, in order to show the good faith of the defendants in the marketing of the products involved in this case,

that their practice was to give this oil free of charge to persons needing it, if such persons could not pay for it, viz.:

"Mr. Gleason. Has it been your practice, Mr. Colgrove, in the distribution of this oil, to give it free of charge to hospitals, doctors, and whoever wanted it for use if they could not pay for it?

"Mr. Zirpoli. I object to this, your Honor, as a pure and simple sympathetic appeal.

"Mr. Gleason. It certainly shows good faith, if the Court please.

"Mr. Zirpoli. I submit that good faith is not in issue.

"The Court. The objection will be sustained. Let it go out and let the jury disregard it.

"Mr. Acton. May we also have an exception, your Honor?

"The Court. Note an exception."

The facts sought to be elicited by this question directly bore upon the good faith of these defendants whom the Government had charged with criminal practices.

ASSIGNMENT No. XXXII. (Tr. 369.)

The Court erred in sustaining an objection of the Government to a question propounded by the defense to their witness Howard Everett. The defense sought to elicit testimony of this witness as to the effects observed by him in the use of Colusa Oil by another person. The Court precluded such testimony by its ruling, viz.:

"Mr. Gleason. Did you ever have any occasion, Mr. Everett, to observe personally the effect of Colusa Capsules—the use of Colusa Capsules—on any other person?

"Mr. Zirpoli. I want to interpose an objection, your Honor. While I recognize that it is proper for counsel to bring a witness into the courtroom who himself used it and can testify as to what this effect has been with relation to his personal use, he cannot call a lay witness to testify as to the effect of the

use of a product of this nature on another person, particularly since he is not qualified. He cannot tell us, nor is he qualified to tell us, of the condition that the particular person may have been suffering from; nor is he qualified to tell us of the results or the beneficial effects.

"The Court. Just a moment. Be seated, gentlemen. The Court is prepared to rule. Read the question, Mr. Reporter."

(Question read.)

"The Court. The objection will be sustained.

"Mr. Acton. Will your Honor allow us an exception to the last ruling?

"The Court. Certainly."

The following illustrates how unfairly the testimony was restricted in this connection, viz.:

"Q. Will you describe the physical condition of the man prior to his use of the oil?

"Mr. Zirpoli. What do you mean by 'physical condition'? His appearance as the witness actually saw it?

"Mr. Gleason. That is what we are limited to under your objection.

"A. Why, he was ill.

"Mr. Zirpoli. Your Honor, that very statement is a conclusion; that he was ill calls for a conclusion; that is not a physical description. I ask that that be stricken from the record.

"The Court. It may go out.

"The Witness. He was thin, depressed.

"Mr. Zirpoli. I ask that the conclusion that he was depressed go out; that obviously is not a conclusion that a person can make.

"The Court. It may go out."

ASSIGNMENT No. XXIII. (Tr. 358.)

The Court erred in sustaining an objection of the Government to certain proposed testimony of the defense, viz.:

"Mr. Gleason. Q. Mr. Colgrove, in the course of your marketing of this product, can you tell us the

number of sales that have been made of this product to people throughout the United States?

"A. Many thousands of them.

"Q. You sold your product on a money-back guarantee, did you not?

"A. Yes.

"Q. Can you tell us how many of the people to whom you sold this product throughout the United States availed themselves of the opportunity to receive their money back?

"Mr. Zirpoli. I object to that as irrelevant and immaterial, and a form of negative proof. I object to it.

"The Court. The objection will be sustained. We are not here concerned with any money-back guarantee. There is no issue involved in this case about money or money back for any sales. Let us proceed.

"Mr. Acton. Will your Honor allow us an exception to the last ruling?

"The Court. Certainly."

The facts which the defense sought to elicit by said question aforementioned were competent, relevant and material because the issues in this case involve several things. In the first place, the good faith of the defendants was in issue, this being a criminal case; in the second place, the efficacy of this product was in issue. The facts sought to be elicited by the aforementioned question would have borne directly upon and would have been relevant to both of these issues.

ASSIGNMENT No. VII. (Tr. 335.)

The Court erred in giving the following instruction to the jury, viz.:

"The sole and remaining question for you to determine from the evidence in this case is whether or not the drugs covered by the three counts of the information were misbranded as alleged by the Government. If you are satisfied from the evidence beyond a reasonable doubt that the articles of drug bore statements in their labeling or accompanying circu-

lars or newspaper mat that were false or misleading in any particular in which they are alleged in the information to be false or misleading, then the drugs in those counts wherein the labeling is so false or misleading in any particular is misbranded in the manner charged by the Government and your verdict shall be guilty as to those counts wherein such misbranding exists. If you find from the evidence that the statements in the labeling of the drugs covered by the respective counts of the information support the therapeutic claims of the defendants and are true, then the drugs covered by those counts wherein the statements on the labeling as to therapeutic claims are true, are not misbranded, your verdict should be not guilty for all or any of those counts wherein you so find."

Said instruction is erroneous in that it is too broad. It in effect instructs the jury that if any false statement was contained on the label or the circulars or advertising material accompanying these products, that would be sufficient to justify a conviction of the defendants, whereas in truth and in fact the only alleged false statements which were in issue were and are those specifically set forth in the information, and which relate to certain phases of the therapeutic efficacy of said products. Said instruction was duly excepted to.

ASSIGNMENT No. VIII. (Tr. 336.)

The Court erred in giving the following instruction to the jury, viz.:

"It is not necessary for the Government to prove that each and all of the statements of each count of the Information contained on the label or in the circulars or newspaper mat are false or misleading. If the Government has established by the degree of evidence which I have explained to you, that any one material statement or representation as to the therapeutic effect of the drug upon the label or circular or newspaper mat covered by any one count is false or misleading, then the article covered by that count

> is misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act, and you should find the defendants guilty as to such counts in which you find the article so misbranded. But if the Government has failed to establish to your satisfaction by that degree of proof and beyond a reasonable doubt any one of the charges of misbranding in any one or more of the counts, then you should acquit the defendants as to such counts."

Said instruction is erroneous in that it is too broad. It in effect instructs the jury that if any false statement was contained on the label or the circulars or advertising material accompanying these products, that would be sufficient to justify a conviction of the defendants, whereas in truth and in fact the only alleged false statements which were in issue were and are those specifically set forth in the information, and which relate to certain phases of the therapeutic efficacy of said products. Said instruction was duly excepted to.

ASSIGNMENT No. X. (Tr. 338.)

The Court erred in giving the following instruction to the jury, viz.:

> "Therefore, if you find from the evidence beyond a reasonable doubt that the drugs involved in the three counts of the indictment, or any of them, were in fact misbranded in the manner alleged in the information or any count thereof, you shall find the defendants guilty as charged in those counts wherein you find the drugs were misbranded, regardless of the intent in the minds of the defendants."

Said instruction is erroneous in that it conveyed the impression to the jury that even if the alleged acts or offenses with which defendants were charged in the information were due to inadvertence and through no willful intent or knowledge on the part of the defendants, the defendants would still be guilty of a crime. Said instruction was duly excepted to.

ASSIGNMENT No. XI. (Tr. 338.)

The Court erred in giving the following instruction to the jury, viz.:

> "If, after hearing the evidence in this case, you reach the conclusion that the drugs or products involved here were harmless, that does not excuse the defendants, if you find that they placed statements upon said drugs which were false, concerning the curative and therapeutic effects of such products, as the danger and injury to the public from representations of this type is in that it induces persons frequently to rely in serious cases upon preparations without healing virtue when, but for this reliance, they would secure proper advice and treatment for the ills which affect them."

Said instruction is erroneous in that it in effect instructs the jury that if any false statement was contained on the label or the circulars or advertising material accompanying these products, that would be sufficient to justify a conviction of the defendants, whereas in truth and in fact the only alleged false statements which were in issue were and are those specifically set forth in the information, and which relate to certain phases of the therapeutic efficacy of said products. Said instruction was duly excepted to.

ASSIGNMENT No. IX. (Tr. 337.)

The Court erred in giving the following instruction to the jury, viz.:

> "The Federal Food, Drug and Cosmetic Act does not make the intent with which an unlawful shipment is made, an ingredient in the offense. The intent of the defendants is immaterial."

Said instruction is erroneous in that it conveyed the impression to the jury that even if the alleged acts or offenses with which defendants were charged in the information were due to inadvertence and through no willful intent or knowledge on the part of the defendants,

the defendants would still be guilty of a crime. Said instruction was duly excepted to.

ASSIGNMENT No. XII. (Tr. 339.)

The Court erred in refusing to give the following instruction submitted and requested by defendants, viz.:

> "To constitute a party guilty of crime, the evidence must show intentional participation in the attempt to violate the statutes in question."

Defendants duly excepted to said ruling. Said instruction was and is proper, and particularly related to the alleged misbranding charged in Count Three. The evidence shows that the omission of certain matter from the labels on the hemorrhoid ointment was inadvertent and without the knowledge of the defendants.

ASSIGNMENT No. XIII. (Tr. 340.)

The Court erred in refusing to give the following instruction submitted and requested by defendants, viz.:

> "There must be an intentional participation in the transaction with a view to the common design and purpose, before a party can be guilty of crime."

Defendants duly excepted to said ruling. Said instruction was and is proper, and particularly related to the alleged misbranding charged in Count Three. The evidence shows that the omission of certain matter from the labels on the hemorrhoid ointment was inadvertent and without the knowledge of the defendants.

ASSIGNMENT No. XIV. (Tr. 340.)

The Court erred in refusing to give the following instruction proposed and requested by defendant Colgrove, viz.:

> "In this case Mr. Colgrove is jointly charged with the defendant corporation in the information. However, you are instructed that it is the law that an officer of a corporation—and here Mr. Colgrove is President of the corporation—cannot be held liable unless he personally knowingly and actually participates in the commission of the act alleged to be unlawful. An officer of a corporation is not criminally liable for the acts of the corporation performed by other officers or agents. Therefore, unless you find that Mr. Colgrove did know that the jars of ointment referred to in the Third Count of the information had not been properly labeled, but that the jars of ointment with the incomplete label had been shipped by clerks and employees of the corporation without Mr. Colgrove's knowledge, then and in that event you will find Mr. Colgrove personally not guilty."

Said ruling was duly excepted to.

Said defendant was simply a corporate officer and cannot be held responsible for corporate acts, except those in which he had a personal participation, and the jury should have been so instructed, particularly with respect to the charge in the Third Count which involved the omission from certain labels of certain quantitative data.

DEFENDANTS' EXHIBIT P FOR IDENTIFICATION.

6-26-42

Field Headquarters,
Williams, California

COLUSA PRODUCTS CO.

Colusa Natural Oil

Colusa Natural Oil Capsules

Colusa Natural Oil Hemorrhoid Ointment

General Offices
Mercantile Building
Berkeley, California
Telephone Thornwall 9112

January 22, 1941

McCoy Label Co.
Montgomery and Commercial Sts.
San Francisco, California

Attention Miss Nelson

Dear Miss Nelson:

The labels were picked up Monday and on opening today I find the capsule labels unuseable because they fail to have the following wording on them:

"A Natural unrefined Petroleum oil containing sulphonated hydrocarbons"

which should appear just above the words:

"in capsules for internal use"

then following that should appear the amount of bottle contents like:

"30 capsules"—for one label

and

"100 capsules"—for other label

I need 2500 of each, front labels only, next week. Please rush them out and send them C.O.D. Also send me 2500 ointment labels with the same wording on the ointment label that is shown on the enclosed box-cover—plus (please add) "contents ¾ oz."

You can make up a good label for this that will fit the little blue jar I am sending under separate cover. No back label necessary on the ointment, and I do not want the ointment label to run completely around the jar, halfway around is sufficient. If you can follow same sort of a general pattern as the oil and capsule labels, I will like it.

Sincerely yours,

C. W. COLGROVE